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IN THE

Supreme Court of the United States

October Term, 1943.

No. 1105 146

SAMUEL A. MILLER, as Trustee in Bankruptcy of the Estate of John Barrymore, Bankrupt,

Petitioner,

vs.

ROLAND RICH WOOLLEY,

Respondent.

Petition for Writ of Certiorari and Brief in Support Thereof.

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After the filing of a petition in bankruptcy, including a debtor's petition under Chapter XI of the Bankruptcy Act, the person and property of the bankrupt or debtor, wherever located, is within the exclusive jurisdiction of the Bankruptcy Court—in custodia legis—and cannot be removed or alienated without the approval and authority of the court.... 41

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October Term, 1943.

No. .....

SAMUEL A. MILLER, as Trustee in Bankruptcy of the Estate of John Barrymore, Bankrupt,

Petitioner,

vs.

ROLAND RICH WOOLLEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Hon. Harlan F. Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

May it please the Court:

The petition of Samuel A. Miller respectfully shows to this Honorable Court:

I.

Jurisdiction.

Jurisdiction herein is predicated upon Judicial Code, Section 240-a, as amended by the Act of February 13, 1935, Chapter 229, Section 1, 43 Stat. 936.

Reference is made also to Rule No. 38-5 (b) of the Supreme Court, wherein is specified some of the reasons

which will be considered by the Supreme Court in the exercise of its sound judicial discretion with respect to the issuance of writs of certiorari.

II.

Summary Statement of the Case.

John Barrymore, the noted screen, stage and radio performer, finding himself in financial difficulties, filed a petition under Chapter XI of the Bankruptcy Act on June 5, 1940. [Rec. p. 2.] In addition to secured and unsecured debts, substantial non-dischargeable obligations were due from him to various taxing authorities. [Rec. p. 134.] In order to make an arrangement with his creditors, Barrymore proposed to turn over all of his future earnings to a Receiver appointed by the Court, and in connection therewith filed a petition [Rec. p. 112] wherein he set forth that he was earning approximately five thousand ($5,000.00) dollars a week, and was in the habit of spending one thousand ($1,000.00) dollars a week for household expenses. He requested that the Court make an order allowing the sum of one thousand ($1,000.00) dollars a week for his household expenses and necessities. Such an order was made fixing his drawing account at one thousand ($1,000.00) dollars a week. [Rec. p. 113.]

Shortly thereafter, the guardian and trustee of John Barrymore's minor children requested that there be paid for the benefit of said minor children certain weekly sums, and on August 2, 1940, the Referee made an order increasing the weekly drawing account of John Barrymore, and ordered the Receiver to disburse payments for these purposes. [Rec. p. 117.]

In September of 1940, Barrymore dismissed the attorneys then representing him, and substituted respondent and one Hiram Casey, as his attorneys in place of the attorneys who originally filed the proceedings for him. [Rec. p. 118.] It seems that shortly before respondent's substitution into the case, respondent was consulted by Barrymore in relation to a divorce action that Barrymore contemplated filing against his then wife, Elaine Barrymore [Rec. p. 555], and respondent told Barrymore that the sum of ten thousand ($10,000.00) dollars was a reasonable fee for handling the divorce matter. Subsequently a written agreement was entered into by Barrymore and the respondent covering this particular fee. [Rec. p. 333.] Nothing was discussed at the time the agreement was entered into as to how the ten thousand ($10,000.00) dollars was to be paid. [Rec. p. 556], but payments were made as follows:

September 28, 1940	$750.00
October 29, 1940	250.00
November 1, 1940	500.00
November 15, 1940	500.00
November 26, 1940	500.00
December 5, 1940	500.00
December 11, 1940	200.00
January 2, 1941	250.00
January 16, 1941	200.00
January 27, 1941	300.00
February 14, 1941	200.00
March 11, 1941	500.00
March 19, 1941	500.00
April 5, 1941	300.00
May 2, 1941	500.00

The total of the foregoing payments is five thousand nine hundred fifty ($5,950.00) dollars. [Rec. pp. 345-6.]

During the time these payments were received by respondent the only income of Barrymore was the allowance out of his earnings paid to him by the Receiver under the orders of the Referee, and for a portion of this time respondent was actually receiving Barrymore's weekly allowance from the Receiver and depositing it in a trust account under a power of attorney from Barrymore and applying the same to payment of Barrymore's bills and the ten thousand ($10,000.00) dollar fee which is the subject of this litigation. [Rec. pp. 239-268.]

During this entire time respondent was attorney for Barrymore. Respondent was substituted out of the case in May of 1941 [Rec. p. 220], and the original petition upon which Barrymore sought to recover the money received by respondent for his services in the divorce action was filed on October 3, 1941, by the new counsel chosen by Barrymore. [Rec. p. 214.]

The divorce action which was handled by respondent was a default case [Rec. p. 582], and it was undisputed that no disclosure was ever made to the Referee in Bankruptcy, the Receiver, the creditors, or anyone else entitled to know, regarding the payment of the fee to respondent out of Barrymore's weekly allowance, but the District Judge found that the Referee and creditors had knowledge of the fact that an action for the divorce was pending and therefore should have known that a fee was being paid in some manner, thus holding in effect that the Referee must deal at arms length with the attorney for the debtor and cannot accept his statements of fact as the truth, but is put upon notice and must investigate.

On May 12, 1941, respondent, with his co-counsel, Hiram E. Casey, filed a petition for compensation, setting forth the services performed by them, for which they requested the sum of seven thousand five hundred ($7,500.00) dollars, and in said petition, signed and sworn to by respondent, it was stated that respondent had not received any compensation for his services in the bankruptcy proceedings, save and except the sum of four hundred fifty ($450.00) dollars. [Rec. pp. 203 and 219.] During the course of the divorce action between Barrymore and his wife, Elaine Barrymore, the Referee warned the respondent that the estate and creditors were in no way interested in using the funds of the estate for the divorce matter. [Rec. pp. 378 and 379.]

The Receiver was not a party to the original petition, although Barrymore requested that the return of the funds alleged to have been illegally collected by respondent, be paid to the Receiver. [Rec. pp. 16 and 29.]

Upon the institution of proceedings by Barrymore against respondent, the Receiver requested the Court to instruct him as to whether or not he should become a party to the proceedings [Rec. p. 30], and in the memorandum opinion of the Referee the Receiver was directed to become a party to the proceedings. [Rec. p. 102.]

It is the petitioner's position that respondent fraudulently obtained the continuance of the order for the payment of the weekly allowance, out of which he received from Barrymore the sum of five thousand nine hundred

fifty ($5,950.00) dollars. It is his position that the original petition of Barrymore to fix his drawing account contained the representation that the money was to be used for household expenses and necessities [Rec. p. 113], and that from time to time respondent attempted to account to the Court for the disposition of the weekly allowance and to explain why it should not be cut down and what had been done with the money from week to week, and that in each of these instances respondent had the opportunity to advise the Court that he was receiving substantial sums out of the household funds in order to pay himself a fee, but studiously refrained from revealing the true facts. [Rec. pp. 417, 468, 469, 470, 471, 473, 474, 505, 506.]

Upon the foregoing facts the Referee filed an opinion [Rec. p. 63] and made findings of fact and conclusions of law ordering the repayment of the five thousand nine hundred and fifty ($5,950.00) dollars. [Rec. p. 103.]

A petition for a review of the Referee's order was filed by respondent [Rec. p. 271], and on hearing in the District Court the order of the Referee was reversed. [Rec. p. 335.] An appeal was taken to the Circuit Court of Appeals for the Ninth Circuit, and that Court held that the Referee had no jurisdiction to make the order for the reason that upon John Barrymore's death an order of adjudication was made which related back to the date of the filing of the petition, and all of the earnings that had passed into the hands of the Receiver were not subject to administration and jurisdiction in the Bankruptcy Court.

III.
Issues Involved.

1. Does an order of adjudication in bankruptcy, entered by reason of the abandonment or default of the debtor under a plan of arrangement filed under Chapter XI, which has been accepted by the creditors and approved by the Court, have the effect of nullifying previous proceedings under the plan of arrangement to the extent that all sums paid to the Receiver from the earnings of the debtor, in the operation of the plan, become the property of the debtor by reason of the fact that under Section 378 of the Act (11 U. S. C. A. 778) the adjudication relates back to the date of the filing of the original petition?

2. Did the Referee in Bankruptcy have summary jurisdiction to order the payment by the respondent, who was the attorney for the debtor, to the Receiver of funds obtained from the Receiver by fraud?

3. Where it is undisputed that respondent at no time disclosed to the Referee and the creditors that large sums from the allowance to the debtor for living expenses were being paid to respondent to apply upon the divorce fee, and made many representations that such allowance was necessary for the debtor's living expenses, and the Referee made statements from the bench and findings of fact that had he known that the allowance to the debtor for living expenses was so excessive as to permit large payments to be made to the respondent the allowance would have been

reduced, may the District Judge reverse the findings of the trial court thus based upon undisputed facts?

4. Is not a contract by a debtor without the approval of the Court, while a proceeding under Chapter XI of the Bankruptcy Act is pending, and the property of the debtor is in *custodia legis*, void, and are not payments made on such contract recoverable?

IV.

Reasons Relied on for the Allowance of the Writ.

A. The Circuit Court of Appeals for the Ninth Circuit Has Decided an Important Question of the Federal Benkruptcy Law, Which Has Not Been, But Should Be, Finally Settled by the Supreme Court of the United States.

There has been no definite decision by the Supreme Court of the United States on the question involved in this case. Here we have a situation where debtor turned over all his earnings to a receiver, and, after the approval of his plan, died, so the plan could not be consummated according to its terms. The referee, pursuant to the Bankruptcy Act, adjudicated the debtor a bankrupt. The question now raised is whether or not all of the earnings of the debtor subsequent to the date of the filing of his petition, under Chapter XI, would have to be returned to the debtor if he was alive and had abandoned the plan, or to his personal representative in the event of his death, and thus oust the bankruptcy court of jurisdiction.

B. The Decision by the Circuit Court of Appeals for the Ninth Circuit Is in Conflict With the Decision of the Circuit Court of Appeals of the United States for the Second Circuit in the Case of Governor Clinton, Inc. v. Knott, *et al.*, 129 Fed. (2d) 149.

In that case the Circuit Court of Appeals ordered repaid to the estate in bankruptcy certain secret profits which were obtained as the result of a fraud upon the Court, and summary jurisdiction was approved as a proper means of bringing the assets back into the bankrupt estate.

The decision of the Circuit Court of Appeals, for the Ninth Circuit, in the instant case is also contrary to a District Court decision in the case of *In re Breinig*, 40 F. Supp. 29.

V.

Brief in Support of This Petition.

Attached to this petition and as a part of the same is a brief in support thereof.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the said Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and send to this Honorable Court for its review and determination, on a day to be named therein, a full and complete transcript of the record and all proceedings in the case numbered 10460 in that Court, and entitled "Samuel A. Miller, as Trustee in Bankruptcy of the Estate of John Barrymore, Bankrupt, Appellant, vs.

Roland Rich Woolley, Appellee," and that its judgment therein made on March 20, 1944 may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated at Los Angeles, California, this 31st day of May, 1944.

SAMUEL A. MILLER,

Petitioner,

BERTRAM H. ROSS,
B. E. AHLPORT, and
EARL E. MOSS,
By EARL E. MOSS,

His Counsel.

Certificate of Counsel.

I hereby certify that I am one of the counsel for the petitioner in the above-entitled cause, and that in my judgment the foregoing petition is well founded in law and fact, and that said petition is not interposed for purposes of delay.

Dated this 31st day of May, 1944.

EARL E. MOSS,

Of Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. .....

SAMUEL A. MILLER, as Trustee in Bankruptcy of the Estate of John Barrymore, Bankrupt,

Petitioner,

vs.

ROLAND RICH WOOLLEY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The District Court did not render an opinion.

The opinion of the Ninth Circuit Court of Appeals appears at page 57 of this brief.

The opinion of the Referee appears at pages 63 to 103 of the Record.

II.

Statement of the Case and the Facts.

This has been covered under headings II and III in the foregoing petition for writ of certiorari. For the sake of brevity the statement is not repeated here, but certain matters of evidence will be averted to under the heading of "Argument."

III.

Specifications of Errors.

The following are assigned as errors in connection with the judgment of the Ninth Circuit Court of Appeals made on March 20, 1944:

(1) Its affirming the judgment of the lower Court by holding that the findings upon which that judgment is based are amply supported by the evidence.

(2) Its finding and holding that the Referee in Bankruptcy was without jurisdiction over the funds received by respondent from the debtor.

(3) Its failure to find that the acts and conduct of the respondent constituted a fraud upon the referee in bankruptcy.

(4) Its holding that the Referee in bankruptcy was without jurisdiction over subsequently acquired property where a plan of arrangement, under Chapter XI, failed and an order of adjudication was entered.

(5) Its failure to hold that a contract made during the pendency of the Chapter XI proceedings without the approval of the Court, between the debtor and the respondent, was void and payments made thereon recoverable by the receiver.

In Proceedings Under Chapter XI a Debtor May Offer to Pay His Earnings to His Creditors, and Such Earnings so Paid Into Court and Undistributed to Creditors Do Not Become the Property of the Debtor Upon His Subsequent Adjudication.

The legal foundation upon which the Circuit Court of Appeals based its decision appears in the two following excerpts from its opinion:

> "If the money paid to the appellee on behalf of the debtor was the debtor's own money to do with as he saw fit, as we believe and hold, the question of whether or not the continuance of the order making the so-called allowance to the debtor resulted from concealment of facts is immaterial, and there is no basis for requiring the repayment to the bankrupt estate of the moneys prepaid to the debtor in the form of an allowance. It was his money both before and after the order. . . .
>
> "The question as to whether the order of allowance in the arrangements proceedings did or could limit the debtor's use of the funds allowed him if doubtful before the adjudication of bankruptcy is set at rest by a retroactive adjudication in bankruptcy which freed his earnings so far as the jurisdiction of the bankruptcy court is concerned from the claim of the bankruptcy court over his property."

The Circuit Court cited as authority Section 378 of the Bankruptcy Act (11 U. S. C. A. 778), to the effect that after the entry of an order of adjudication under Chapter XI, "the proceedings shall be conducted, so far as possible, and in the same manner and with like effect as if a voluntary petition for adjudication in bankruptcy had

been filed and a decree of adjudication had been entered on the day when the petition under this chapter was filed," and *In re Leibowitt,* 93 F. (2d) 333, 335, holding that the wages of a bankrupt after adjudication are not subject to the claims of the bankrupt estate. The Circuit Court also cited Section 341 (11 U. S. C. A. 752), which provides that where not inconsistent with the provisions of Chapter XI, the rights, duties and liabilities of creditors and of all other persons with respect to the property of the debtor shall be the same as in a voluntary bankruptcy proceeding.

The Circuit Court's decision that by reason of the fact that upon the failure of or abandonment of a plan of arrangement and the subsequent adjudication of the debtor as a bankrupt, the adjudication relates back to the date of the commencement of the proceeding, and all the funds paid to the Receiver from the earnings of the debtor were then in effect paid after the order of adjudication, and were not subject to the claims of creditors under *In re Leibowitt, supra,* will have a far-reaching effect in this as well as other Chapter XI proceedings. In this matter the effect is that the funds remaining in the hands of the receiver, proceeds of the earnings of the debtor paid into court in accordance with the debtor's plan of arrangement and undistributed to creditors, become the property of the debtor's probate estate.

The Circuit Court's construction of the Bankruptcy Act is clearly erroneous. Chapter XI of the Bankruptcy Act (Sections 301 to 399, inclusive), creates a complete, practical and workable method whereby a debtor may offer his creditors any lawful plan for the payment of his debts. By the acceptance of the debtor's offer, as con-

tained in his plan of arrangement, by his creditors and the confirmation by the court, a contract comes into being by which the parties are bound during its existence. This contract may be terminated by the debtor. (*McKeever v. Local Finance Co.*, 80 F. (2d) 499.) It may be terminated by the Court upon default or its consummation, under Section 377, and if it is an original Chapter XI proceeding, not one filed after the commencement of a bankruptcy proceeding), the Court may either dismiss the proceeding or enter an order of adjudication. But this is a termination of the contract only, and not a rescission voiding the contract from its inception. Such termination does not affect or change the terms of the contract, as a rescission might. It simply ends the proceedings under the contract.

The offer made by the debtor to pay his earnings into Court for the disbursement to his creditors was a legal offer, as will be demonstrated by quoting Article VIII of Chapter XI, entitled "Provisions of arrangement," which is as follows:

> "Sec. 356. An arrangement within the meaning of this chapter shall include provisions modifying or altering the rights of unsecured creditors generally or of some class of them, upon any terms or for any consideration.
>
> Sec. 357. An arrangement within the meaning of this chapter may include . . .
>
> (1) Provision for treatment of unsecured debts on a parity one with the other, or for the division of such debts into classes and the treatment thereof in different ways or upon different terms;

(2) Provisions for the rejection of any executory contract.

(3) Provisions for specific undertakings of the debtor during any period of extension provided for by the arrangement, including provisions for payments on account;

(4) Provisions for the termination, under specific conditions, of any period of extension provided by the arrangement;

(5) Provisions for continuation of the debtor's business with or without supervision or control by a receiver or by a committee of creditors or otherwise;

(6) Provisions for the payment of debts incurred after the filing of the petition and during the pendency of the arrangement;

(7) Provisions for retention of jurisdiction by the Court until provisions of the arrangement, after its confirmation, have been performed; and

(8) Any other appropriate provisions not inconsistent with this chapter."

Clearly, then, there is no basis in the statute for the Circuit Court's holding that because the entry of the order of adjudication reverted back to the date of the filing of the petition, the contract as contained in the plan and its confirmation was rescinded, inoperative from its beginning and completely set aside. Nor is the decision sustained by *In re Leibowitt*, 93 F. (2d) 333, which holds only that in an ordinary bankruptcy proceeding the wages of the bankrupt earned after the adjudication are not subject to the claims of creditors, which has always been the law and without which law bankruptcy proceedings would be of little benefit to the bankrupt. It is true that to keep the debtor's estate *in custodia legis* for the protection of the

creditors, it was necessary to provide that an adjudication entered after the termination of a plan of arrangement should revert back to the date of the filing of the original petition. The existence of that necessity, however, provided no ground for Congress legislating that the termination of a plan of arrangement has the effect of rescinding and completely setting aside the contract between the debtor and his creditors, which is what the plan, its acceptance by the creditors and confirmation by the Court become. And it is clear that Congress did not so legislate.

The Referee Had Jurisdiction to Order Respondent to Repay the Funds Received by Him From the Debtor Out of the Weekly Drawing Account.

A. THE PAYMENT TO DEBTOR WAS MADE AS A RESULT OF A REPRESENTATION THAT THE FUNDS WERE REQUIRED BY DEBTOR FOR LIVING EXPENSES.

B. THE RESPONDENT CONCEALED FROM THE COURT THE FACT THAT THE MONEY THAT WAS REPRESENTED AS BEING USED FOR LIVING EXPENSES WAS BEING ACCEPTED BY HIM AS A FEE.

C. PROPERTY SECURED BY FRAUD OR MISREPRESENTATION FROM THE ESTATE OF A DEBTOR MAY BE RECOVERED IN A SUMMARY PROCEEDING.

We rely upon the case of *Governor Clinton, Inc., v. Knott, et al.*, 129 Fed. (2d) 149 (C. C. A. 2, 1941), to which the Circuit Court's decision in this matter is squarely contrary. That case was one involving a proceeding under Section 77-B of the Bankruptcy Act, where the property of the debtor had been under the control and management of a committee consisting of three persons including the attorney and officers of the debtor. This committee did

not operate the property successfully and the Court ordered the same to be managed by the Knott Management Corporation. This corporation successfully managed the property. However, one-third of the compensation received by the Knott Corporation was secretly paid to the members of said committee consisting, as aforesaid, of two officers and the attorney for the debtor corporation. The successor in interest of the debtor then sought to secure a summary order requiring the above three persons to repay all money received from the Knott Management Corporation. Concerning the power of the Court to order the repayment of such funds in a summary proceeding, the Court, at page 152, said:

> ". . . Summary jurisdiction may be invoked for purposes other than to protect property within actual or constructive possession of the Court. Here a contract was made with the debtor in possession and a fraud worked on this estate through a common conspiracy among the respondents. This amounts to a fraud and imposes on the Court itself, and in such cases the Court undoubtedly has summary jurisdiction to protect itself and the interests of the persons and property within its custody."

It is also interesting to note that in the above case, as in that at issue,

> "Their removal (funds of the estate) from its (the Court's) custody was not by force but by order of the Court itself." (*Ibid.* p. 152.) (Words in parentheses added.)

The *Knott* decision and any other on the subject of summary jurisdiction all have their origin in the opinion of the Supreme Court of the United States in *May v. Hender-*

son, 268 U. S. 111. In that case there was an assignment for benefit of creditors prior to the filing of a petition in bankruptcy. Both before and after the filing of the petition, with knowledge thereof, the assignee paid out certain funds of the bankrupt. The trustees sought to recover all funds so paid, and in holding that the trustee was entitled to recover, the Supreme Court, at page 117, said:

> "The rule is the same when the creditor secures payment of his debt from the bankrupt estate after the filing of the petition. A summary order may be made directing the repayment of money to the trustee in bankruptcy."

In *Matter of Payman,* 40 Fed. (2d) 194, it is said concerning the *May* case:

> "The decision squarely held that a court of bankruptcy has power to compel a person to make restitution who has disposed of the bankruptcy funds with knowledge of the petition."

The general rule here contended for is approved in *Knapp, Spencer Co. v. Drew,* 164 Fed. 413; *In re Skirt Company,* 222 Fed. 256.

It was held in *In re Breinig,* 40 F. Supp. 29, that the Bankruptcy Court had exclusive jurisdiction over the debtor and his property. In that case the Referee assumed jurisdiction over debtor's attorney for services rendered both before and after the filing of the petition and in and outside of the bankruptcy court.

In applying the foregoing principles of law to the facts of the case at bar, it will be necessary to quote extensively from the testimony.

It may be argued that once the debtor received his weekly allowance that he was a free agent to do what he wanted with the money thus received. This, however, is false reasoning. We are dealing in this case with a debtor who offered to pay all his earnings into Court and receive from the Court a reasonable allowance to be used for specific purposes. Among other things in his petition, debtor stated:

> "Your petitioner alleges that a reasonable drawing account pending the further order of this Court as and for his living expenses herein and for his services herein should be and is the sum of One Thousand ($1,000.00) Dollars per week." [Rec. p. 113.]

In his prayer the debtor stated:

> "Wherefore, your petitioner prays that an order be made herein fixing his drawing account for his household expenses and necessities at the sum of $1,000.00 per week, subject to the further order of this court." [Rec. p. 113.]

Thus, at all times the Referee had before him the sworn representation of the debtor that the money that was being paid out by the Receiver was being paid for household expenses and living expenses. Nothing is said about attorney's fees or other expenses.

On November 28, 1940, under the signature of respondent, debtor consented to a voluntary reduction from $1,000.00 per week, and referred specifically in said document to the proceedings of June 5, 1940. [Rec. p. 145.]

It must be borne in mind that respondent in this case is an attorney who appeared in the proceeding as the attorney for the debtor, and he certainly is subject to the

jurisdiction of the Court with regard to his fees for services rendered in a court other than the bankruptcy court.

In re Breinig, 40 F. Supp. 29.

Respondent cannot hide behind the defense of lack of jurisdiction where he actively appeared in the proceeding and by his very own statements concealed from the Referee the fact that he was receiving a portion of the debtor's living expenses.

It will be noted from the record that during the employment of respondent as attorney for debtor, the Referee stopped the weekly allowance for living expenses for the reason that the debtor became unemployed and later restored the allowance for the reason that the debtor again was bringing money into his estate [Rec. p. 126], and in this respect respondent was active in bringing about the restoration of the allowance. [Rec. p. 370.]

The Referee's Findings Are Sustained by the Evidence and the Judge's Findings Are Contrary to the Evidence.

Finding I of the Referee's findings was that on June 5, 1940, an original petition under Chapter XI was filed by the debtor, and that the same was still pending. [Rec. p. 104.] The Referee also found that the agreement for the payment of the $10,000.00 fee in the divorce action was signed on September 20, 1940, three and one-half months after the commencement of the proceedings, at a time when respondent had knowledge of the pendency of the bankruptcy proceedings, and that neither the Referee nor the creditors had knowledge of the making of the agreement until about May 17, 1941, and that the agree-

ment was not approved by the Court. [Rec. p. 106.] The Referee further found:

"X.

That on various occasions between the 26th day of September, 1940, and the 17th day of May, 1941, when the amount of the allowance to the debtor for support and maintenance was under consideration, respondent represented to the court and the creditors of said debtor, that the sums being allowed the debtor by the court for the debtor's support and maintenance were necessary for that purpose, which said representations were untrue, and were made by said respondent with the intent of enabling the debtor to secure sufficient funds from the receiver to permit the payment to respondent by the debtor of large sums on account of said attorney's fee in said divorce action. That between said 26th day of September, 1940, and said 17th day of May, 1941, respondent caused the debtor to pay to the respondent, out of funds which the debtor had earned since the commencement of this proceeding, and which were allowed to the debtor by the court for the debtor's maintenance, the sum of five thousand nine hundred and fifty ($5,950.00) dollars, to apply on attorney's fees claimed by said respondent under said purported agreement of September 20, 1940. That said payments were made on the following dates and in the following amounts:

September 28, 1940	$750.00
October 29, 1940	250.00
November 1, 1940	500.00
November 15, 1940	500.00
November 26, 1940	500.00
December 5, 1940	500.00
December 11, 1940	200.00
January 2, 1941	250.00

January 16, 1941	200.00
January 27, 1941	300.00
February 14, 1941	200.00
March 11, 1941	500.00
March 19, 1941	500.00
April 5, 1941	300.00
May 2, 1941	500.00
Total	$5,950.00

That neither the court nor the creditors of the debtor, prior to about the 17th day of May, 1941, had knowledge of the payment of said sum of five thousand nine hundred and fifty ($5,950.00) dollars by the debtor to the respondent. That if the court had had knowledge of the making of said payments by the debtor to the respondent the amount of the allowance to the debtor for his living expenses would have been reduced and the court would not have permitted any payments to be made by the debtor to respondent to apply upon the said purported agreement of September 26, 1940." [Rec. pp. 107-108.]

From the findings the Referee then drew conclusions of law that the agreement for the payment of the $10,000.00 divorce fee was void, by reason of the fact that it was made while the proceedings were pending and not approved by the Court; that the orders for the payment of the allowance to the debtor were made, and requests of the creditors that the amount of the allowance be reduced were denied by the Court in reliance upon the representations of respondent and his associates that such amounts were necessary for the maintenance of the debtor, which were untrue, and ordered the $5,950.00 paid to the Receiver. [Rec. pp. 110-111.]

The findings of the District Judge, reversing the order of the Referee, cover pages 335 to 357 of the Record. Digging the meat out of these verbose findings it appears that the District Judge based his reversal on the following grounds:

That it is not true that the sums paid the debtor were only for living expenses; that the orders for the payment of the allowance did not limit nor restrict its use. [Last par. Finding III, Rec. p. 344.] The first statement is clearly refuted by the debtor's petition and order of the Referee appearing on pages 112, 113 and 114. Whether or not the order for the payment to the debtor of his allowance restricted its use was not an issue. The Referee found that but for the fraudulent representations and concealment of respondent the allowance would have been reduced so that no money would have been available for payment to respondent.

That the divorce fee agreement did not concern the arrangement proceedings or the assets of the debtor owned at the time of its commencement; that it was neither necessary nor required of respondent that he reveal the existence of the divorce fee contract nor the payments thereunder to the Court or creditors. [First par. Finding VII, Rec. p. 47.]

That the pendency of the divorce proceedings, and the fact that respondent was rendering "extensive legal services" therein, were discussed in Court on October 9, 1940; November 6, 1940; November 7, 1940; March 18, 1941, and April 21, 1941; that the Referee and creditors knew that all the debtor's assets were in the custody of the bankruptcy court; that all sums earned by him since the commencement of the proceedings had been paid to the Receiver. [Rec. p. 348.]

Then follows a finding that is really a legal gem, which we desire to quote:

> "The court further finds that the said referee in bankruptcy and the creditors knew as early as October 9, 1940, that an agreement existed between Roland Rich Woolley and the debtor for the debtor's legal representation by Roland Rich Woolley in the divorce matter, and knew or should have known, that said Roland Rich Woolley was being paid, or would be paid, compensation for said services from sums received by John Barrymore as an allowance herein." [Rec. p. 348.]

Back in Finding VII [Rec. p. 347] the District Judge found that the divorce fee agreement was neither submitted to nor approved by the Referee because it was none of his business. Now respondent concedes that the Referee and the creditors were entitled to know of the existence of the agreement and the making of the payments thereunder, because they were put upon notice and should have known. In other words the Court cannot accept the statement of the attorney for the debtor as true but is put on notice and must investigate any facts tending to indicate its falsity.

Continuing with the District Judge's findings:

That the orders which the Referee states he made in reliance upon respondent's representations that the same were necessary for the debtor's maintenance were not so made, because the first order was made prior to the respondent's becoming the debtor's attorney, and was continued in effect, with two trivial modifications, during the respondent's entire representation of the debtor. [Finding VIII, Rec. p. 349.]

Thus is ignored the fact that the Referee found, as previously quoted, that, in effect, the amount of the allowance was continued despite constant demands for its reduction by reason of his reliance upon respondent's representations as to its necessity.

The District Judge then finds that during the time the respondent was the attorney for the debtor neither the Referee nor the Receiver "ever sought, requested or demanded" an accounting of the money paid over to the debtor. [Rec. p. 350.] As to what the Referee and creditors were endeavoring to learn from the many inquiries which they directed to respondent at the various hearings, which we will hereafter quote, and which respondent skillfully parried, this Court will be the best judge. The foregoing finding is then followed by a finding that the allowance to the debtor was not made or continued upon any representations by the respondent, "but was made and predicated upon John Barrymore continuing voluntarily to pay into court all his personal earnings as an actor in excess of sums which he sought to withdraw, and upon such earnings so paid being in excess of amounts paid to him pursuant to said orders for an allowance." Respondent must have considered the situation desperate to request such a finding from the District Judge in view of the fact that debtor was not being hired. He had no alternative. With many non-dischargeable debts he required the Court's protection to permit him to draw any part of his salary, or his creditors would have taken it all. He was coming to the Court hat in hand and asking a favor; not as a temperamental employee dictating the conditions upon which he would work. In his original petition for an allowance [Rec. pp. 112-113], he alleges that he had previously expended $1,000.00 per week "as and for his household and necessary expenses"; that a reasonable drawing

account "as and for his living expenses herein and for his services herein" should be and is the sum of $1,000.00 per week, and prays that an order be made "fixing his drawing account for his household expenses and necessities at the sum of $1,000.00 per week." Effort is made to place great weight on the words "and for his services herein." We know of no other place in the record where this or any similar expression is used, and in all the various statements made by respondent attempting to justify the allowance to the debtor and prevent it being reduced, there is never any statement to the effect that the debtor was an employee entitled to $1,000.00 a week for his services, which would have been ridiculous in view of the fact that he was often earning $5,000.00 a week and more.

Continuing with the District Judge's findings, we find that finding was next made that it is not true that respondent concealed from the Referee the fact that $5,950.00, or any sum, was paid as attorney's fee in the divorce matter. We assume this finding to be a delicate shading of the meaning of the word "conceal," because in Finding VII [Rec. p. 347] the Judge found that the divorce fee agreement was not submitted to nor approved by the Referee, nor was the Referee informed of the terms thereof, nor of the payments thereon. The Judge then finds that respondent did not state the amount of the fee because he believed that the debtor was entitled to use his drawing account for any purpose he saw fit and that the Referee knew that respondent was receiving compensation for his services in the divorce action, and that "the referee was not concerned with nor interested in the amount of payment thereof, provided it was paid from said allowance or drawing account." Or, in other words, the transaction was clean and there was no reason for concealment. We ask this Court to judge, from the respondent's own words,

which we will hereafter quote, whether he was desirous of revealing all the facts, and whether he was discussing a proper transaction, or whether he intended to conceal the facts and mislead the Referee and creditors.

The first of many occasions wherein representations were made to the Referee concerning the necessity of the allowance for the maintenance of the debtor occurred on November 6, 1940. One of the respondent's associates, Mr. Casey, referring to the debtor, said:

> ". . . inasmuch as it is necessary for him to have it to maintain himself. . . . He has to live and he has to maintain himself and the expenses that he meets in his work and he just cannot do the impossible." [Rec. pp. 373-374.]

On January 31, 1941, at a hearing where the details of the proposed plan of arrangement were discussed, the following occurred:

> "Mr. Durst (a creditor): I think the allowance should be cut down now. Three hundred should be set aside as a reserve and he be only paid six hundred a week now. (Words in parentheses added.)
>
> Mr. Rank (an associate of respondent): We don't agree to that, and there shows the lack of cooperativeness on Mr. Durst's part, to raise that question. We have been trying to get the plan through and we are not going to be committed to any such amount because we do not think that it is a fair amount. Mr. Barrymore is only willing to do it because of the hope he has in working it out. (Words in parentheses added.)
>
> Mr. Casey (an associate of respondent): We are in a very critical position with Mr. Barrymore to go before him and say 'You are reduced to $600.00 a week' as it will take it right out of him. I know

when I am expecting $100 and get only $50 I have really spent it all. We have a problem here to get him to agree to a few things and sometimes you cannot do that. I don't think we should put something in his way that will make him hostile or mad. (Words in parentheses added.)

Mr. Woolley: When my office took his case over everybody knows he was a physical wreck. We have been making a great effort to get his health and physical condition built up. It has taken a lot of time and he has been living in a place stripped of everything, not a decent bed to sleep on, with not a rug on the floor, by reason of the treatment he had received from the people he was living with at the time, and we have been trying to get the man surrounded with circumstances and environment that will build up his morale. It has taken money to do that. You cannot kill the goose that is laying the golden egg, and any attempt to do it at this time is leaning toward that very end." [Rec. pp. 416-417.]

Up to that time respondent had received $3,950.00 to apply on the $10,000.00 divorce fee, and he might well have very truthfully mentioned to the Court and creditors, if he did not have anything to conceal, that he had received this amount and desired the allowance to the debtor maintained at its high figure in order, among other things, to permit him to receive still further sums on the divorce fee.

On March 11, 1941, respondent paid himself another $500.00 out of his trust account wherein he deposited the Receiver's checks to the debtor under the debtor's power of attorney which he had secured, which made a total of $4,650.00 which he had then received to apply on the $10,000.00 fee. Then a week later, on March 18, 1941,

a hearing was had during which, as so frequently occurred, the necessity for such a large allowance was again raised, and the following statements were made:

> "The Referee: . . . Now, there are two items the court does not approve of in this plan: One is the fact that Mr. Barrymore gets $600.00 a week and his attorneys $100.00 a week. There are two items that a very substantial reduction can be made on. If Mr. Barrymore has to have attorneys after this plan is approved he will have to pay for them out of his own allowance. If Mr. Barrymore is given $600.00 a week he should be able to pay his own counsel without that additional expense. Now, I know it will be argued Mr. Barrymore cannot get along on less. He may have to get along on a whole lot less. People can get along on less when they have no way of getting it. . . ." [Rec. pp. 457-458.]

The effect of the foregoing statement by the Referee was that he would not allow an additional $100.00 a week over and above the $600 per week allowance for the debtor's maintenance. Imagine the shock to the Referee if he had learned that in less than six months the respondent had received $4650.00 out of the debtor's allowance, to apply on the $10,000.00 fee.

At this same hearing the following further discussion was had:

> "Mr. Wix (attorney for a creditor): I have not agreed with many things in this proceeding, but I do agree with the thought that Mr. Barrymore should make an accounting, and there should be some finding here or some information before this court indicating whether he needs $600 a week. I don't think he does. He doesn't pay anything for rent, and I don't think

any person who has $110,000 of obligations outstanding has a right to be living on $600 a week, and I think that is the thing that is really wrong with the plan. They are trying to take out too much, which is indicated by the fact of how much the receiver has on hand. It has been in here ten months and there is apparently nothing left in the hands of the receiver to pay the taxes, apparently, for that period. In other words, when you pay Mr. Barrymore what he wants and if you paid the government its current taxes there would be nothing left to pay on the back taxes. That plan of arrangement is a plan whereby the debtor can come in and hold his creditors at bay forever. The order from this court prohibited us from proceeding with the case we had filed, enforcing our lien against the security, and while we have been sitting here he has been drawing $600.00 a week. (Words in parentheses added.)

Mr. Casey: $1000.00 a week.

Mr. Wix: Yes, and then $900 a week and then $600 a week. Now then, there is only one office of the United States Government who draws more money than Mr. Barrymore and that is the President. Then they give you the talk he cannot live on less. He will have to live on less in the future, and he probably has in the past. Mr. Hotchener, who was with Mr. Barrymore for ten or twelve years, can verify the fact his needs are not excessive. In other words, he does not entertain much, he does not have to. Why does he get contracts for pictures? Because he entertains some producer? No. Because John Barrymore stands for something in the theatre, because the name 'Barrymore,' before him, stood for something. He has that drawing power for that reason. He doesn't have to pay for publicity and propaganda. If he does,

let them come in and show it. When we were trying to find out some of his expenses, as far as we got he could not begin to itemize his expenses—

Mr. Casey: That is a misstatement of the record.

Mr. Wix: I don't remember the record, but his testimony was so vague anybody could be forgiven for not remembering what he did say. If there is any question about it let them come in and account for how they use that money. I don't think he should have a dime over a thousand dollars a month. If he cannot live on a thousand dollars a month, it is just too bad whether he will or not. They have always held the threat over us he is temperamental and cannot do that. I am getting tired of his threats."[Rec. pp. 462-463.]

. . . . . .

"Mr. Casey: I have read Section 307. Mr. Wix has expressed it as though we were pitching the money out of the estate. This money is not in the estate. We are not sacrificing any property of the estate when we pay Mr. Barrymore $600 a week. If Mr. Wix wants to drive a Ford that makes 30 miles to the gallon that's one thing, but if you want to operate a Cadillac that's another matter. If a man earns $200,000 a year and gets only $12,000 for himself, why should he earn that?

Mr. Wix: Well, because he has creditors.

Mr. Casey: When you get as old as Mr. Barrymore or myself are you going to hit problems in life that are going to take that incentive away. Any man that exercises his talent and earns $200,000 a year must have some compensation, present compensation, and if you are going to try to make Mr. Barrymore live like you or I or Mr. Wix does he is not going to earn $200,000 a year. I am speaking seriously. If

we make $500.00 a month and the alimony court says 'you pay $450 a month to your wife,' are we going to continue to earn $500 a month? No, we are not. You ask that he make an accounting for what he made the last ten months. If the County is not satisfied you are not earning $500 a month and orders you to pay it, you will pay it out of what? What does it cost Mr. Barrymore to live? I will ask any attorney who makes ten or twelve or fifteen thousand a year, what do you do with your thousand dollars a month? We have office expenses and haven't you your income taxes, and when you get home how much is left for your family so that your family can go to the neighborhood picture show or to the opera? $600 is the least that Mr. Barrymore can get along on on his own standard of living.

The Referee: What would he spend $600 a week for?

Mr. Casey: I could start in on a few of the items I have figurered out, and I have not talked to Mr. Barrymore about it. He has four employees—five employees.

The Referee: What are they?

Mr. Casey: He has a gardener and chauffeur, he has his house-boy and then he has a gentleman that goes around with him. They get a hundred and twenty to a hundred and fifty dollars a month.

(Laughter in the court room.)

Mr. Casey: What is the idea of the hilarity? It is a serious problem, Your Honor.

The Referee: That all might be very fine if a fellow was not in bankruptcy.

Mr. Casey: If we were asking this money to be allowed out of the present assets—

The Referee: He does not pay them any $600 a week. He does not average paying them $25 a week.

Mr. Casey: Yes, Your Honor.

The Referee: He pays them all how much?

Mr. Casey: They get about $35 a week, at least two of them. The gardner gets $25 a week. These are my figures. I am not positive, and I don't think really these details are of any concern to the creditors, particularly the secured or unsecured to be paid out of future earnings. I estimate about $500 a week that he has to spend that he personally does not get any pleasure out of.

The Referee: How much?

Mr. Casey: $500 a week.

The Referee: I don't know what it would be for.

Mr. Casey: He has his automobile maintenance and his personal spending money.

The Referee: He wouldn't be working and using an automobile an awful lot of the time.

Mr. Casey: He has to use it and the maintenance of it costs money.

The Referee: After all there is only seven days in a week.

Mr. Casey: The maintenance runs him $15 to $20 a week.

The Referee: What is he going to do with $100 a day?

Mr. Casey: Maintain his house expense, his general utilities, telephone—

Mr. Woolley: Pardon my interruption. Mr. Barrymore is living at the large place out on Tower Road. He makes a payment of $90 a week to Elaine Barrymore under the property settlement.

The Referee: That would leave him five hundnred and ten.

Mr. Casey: And the salary to his domestic employees.

Mr. Woolley: Which is approximately $125 a week. There is a very large place there to take care of.

The Referee: That leaves $385.

Mr. Casey: And groceries and meats.

Mr. Woolley: House expenses approximately $80 to $100 a week.

The Referee: What?

Mr. Woolley: From eighty to a hundred dollars a week.

Mr. Durst: That is reasonable, Your Honor.

The Referee: A week?

Mr. Durst: Yes, with Mr. Barrymore's standard of living.

The Referee: I don't think he can eat any more than I can.

Mr. Woolley: You asked for it, Your Honor, and I am trying to give it to you.

The Referee: I am asking for it, and I think that figure is entirely out of reason for a man who has as much bills as he has.

Mr. Woolley: Public utilities at the large place he lives in $20 a week, a telephone bill of from $15 to $20. The place has been badly run down. The lawns were in very bad shape. There was no furniture at all in the house when he moved back there in September, there was a bed and one or two chairs is all and he has been trying to furnish a few rooms and make them livable and suitable and accessible to him and that has been taking some money. There has

been considerable money paid to decorators and for furniture and the like. There is automobile payments, repair of the grounds, getting the lawns in shape, cleaning and miscellaneous expenses, all of which would total over $500 a week. Now, that does not take into consideration any extra expenses.

The Referee: Are we concerned in fixing Mr. Barrymore a nice place to live in, or are we concerned in paying the debts off?

Mr. Woolley: We are concerned in paying the debts off but as I said before you cannot kill the goose that is going to lay the golden egg. Mr. Barrymore is accustomed to a high standard of living. His expenses now are cut down. His help around him understand the situation and are struggling with him and they are diligently struggling to cooperate with him.

The Referee: I am not going to approve a plan that is not workable. I have too many of those in my office right now. I would say at least ten out of every twelve are not working as they should.

Mr. Woolley: May I say further this plan is the result of conferences over an extended period of time with Mr. Durst, Mr. Schaumer, Mr. Black and Mr. Fred Sturdy and others, and several of these men know Mr. Barrymore, they know his standards, know his method of living, know his temperament and out of the discussions have spent a great deal of time and effort to avail themselves of this plan which has finally—

The Referee: Mr. Barrymore's temperament has got to fit the court's temperament here. I am not concerned with his temperament.

Mr. Woolley: You have to, if I may respectfully say so, within reason. Mr. Barrymore wants to fit

the wishes and temperament of the court but at the same time we must frankly recognize human shortcomings.

The Referee: I am not trying to fit my temperment to his. He has to fit mine.

Mr. Woolley: That is true, but at the same time if you are going to take the heart out of a man and not give him a few comforts—

The Referee: Here is the situation. The Court or none of the parties present are responsible for Mr. Barrymore's predicament. It is his own mess he created himself.

Mr. Woolley: His own mess, granted.

The Referee: There is one way to get out of it, and that is to stop the manner of living that brought him into it. If he cannot fit himself into that picture the sooner the Court finds it out the better we will all be off.

Mr. Woolley: At the same time you cannot sit down and arbitrarily rule, in my humble opinion, and say, this is the way it is going to be, without taking into consideration the type of man you are dealing with. If you are going to kill his morale and take his spirits away from him—and the man was depleted in health and had no ambition by reason of his poor health—you will undo all we have been doing in taking time to rehabilitate him, and sort of rebuild the man. The last few months since I have been in contact with him a doctor has been constantly in touch with him for at least two or three times a week, building him up, giving him vitamins and things he needed. His system was depleted. He is an entirely different man today from what I saw in September. I have done nothing really in addition to the legal and financial end of preserving and trying to

direct the situation of his domestic domicile and the kind of people surround him and his habits so he could rehabilitate himself, but when Mr. Wix, with a secured claim, comes in, with all due respect to him, with a $2700 lien and wants to strike at him he is doing so in spite of the wisdom and opinion of the various men we have struggled with over the plan for the past several months." [Rec. pp. 462 to 471, incl.]

. . . . . .

"Mr. Woolley: In discussing his manner of living, Your Honor, please, I personally think it is an improper thing for him to live in that large house and I have talked to him by the hour in regard to the advisability of it but his heart is so set on living there that if you take him away and put him somewhere else he will go to pieces. In view of the fact he is so determined he just goes into a rage if you discuss anything else in regard to his living, but if he lives any place else his living expenses could be reduced considerably.

The Referee: If some creditors step in and take the place away he probably would not live in it.

Mr. Woolley: We may then have nothing to discuss. If a fellow goes to pieces and he does not work—

The Referee: The Court is not here trying to put a fellow together that cannot stay together himself. We are not engaged in that kind of work. A man coming in here and asking equitable relief is supposed to do equity and the Court is not going to try to satisfy Mr. Barrymore's temperament, especially when it costs creditors money.

Mr. Woolley: I think Your Honor has been very considerate and human in taking those things into

consideration in the past, and I think it is Your Honor's duty to do so, but not to go beyond the bounds of reason.

The Referee: I appreciate this, that Mr. Barrymore needs more money to live on than the average person, but an $80 grocery bill per week is absolutely ridiculous.

Mr. Woolley: Frankly, you let Mr. Barrymore go out for his entertainment and he goes into Earl Carroll's place and other places like that, and you have bills piling up which are prohibitive, but if you keep him at home you will find—and we have been trying to persuade him to do so—he brings friends to his home and he takes better care of his health there.

The Referee: Do you realize that is an average of about four dollars a meal?

Mr. Woolley: Well, when there are a lot of people around—

The Referee: That is a lot of money to pay for your meals when you owe creditors $100,000."

In our opinion, it would be difficult to conceive of a more studied effort to conceal and deceive. In the face of statements by respondent like the foregoing, and others which we will hereafter quote, what evidence is there upon which to base the District Judge's finding that respondent was not guilty of concealment of facts and false statements. Up to the date the foregoing statements were made respondent had collected $4650 to apply on the $10,000.00 fee, of which $500.00 had been collected within a week. What statement would the Court have a right to expect from a member of the bar, an attorney for one of the parties to the proceeding—if not at the first time

the amount of the debtor's allowance was questioned, then certainly after the foregoing discussion, particularly if the facts were as found by the District Judge? Something to this effect:

> "Your Honor, we do not desire either the Court or the creditors to be misled. We have an agreement with the debtor to represent him in a divorce action, for which he has agreed to pay us a fee of $10,000.00. We did not submit the agreement with the debtor to the Court nor the creditors for their approval, because we believe it is a matter with which they are not concerned. It is a perfectly legal agreement and we stand on it. The allowance to the debtor is based upon the amount of his earnings, and we do not concede that we are required to justify it or be questioned about it. The money belongs to the debtor to disburse as he sees fit, and in accordance with our belief in the correctness of that position, we have caused the debtor to pay us, and we have paid ourselves out of the trust account into which his allowance from the Receiver is deposited under his power of attorney, the sum of $4650.00 to date, and expect to continue to pay ourselves any surplus that may remain in the trust account, until we have received the full fee of $10,000.00."

What did respondent have in mind when he stated to the Referee:

> "You asked for it, Your Honor, and I am trying to give it to you."

The day following the session at which the foregoing discussion occurred respondent paid himself another $500.00, and then approximately two weeks later, on April 5, 1941, another $300.00, and then at the hearing on

April 21, 1941, when the same subject was again under discussion said:

> "Mr. Woolley: I think Your Honor can take judicial notice of the fact, and everyone in this room knows of the extreme delicacy of Mr. Barrymore's health, and by reason of that fact it takes practically twice the expense to maintain him and twice as many people around him to properly look after him and take care of his wants. Mr. Rank has mentioned the constant medical attention, something he is receiving now and which I am advised he has never submitted to before, but he has submitted to it and is following the instructions to a remarkable degree because he has the incentive to work himself out of this dilemma, but he has been criticizing me and my office because of the fact that he has not been receiving more. He feels he is not being treated fairly. We have told him it is his problem and he must be willing to restrain himself but he feels he has been unduly restrained. I am just telling Your Honor the repercussions we are meeting with and the severe criticism from persons trying to upset the efforts being made, and there have been people going to Mr. Barrymore and telling him that we have been failing in our efforts toward him and that he should receive more. This is the problem in mind in taking care of the various expenses Mr. Rank has enumerated. We assure you when you figure the help he has around him and the demands on him and what he is receiving now he feels very much abused." [Rec. pp. 505-506.]

We would be remiss in not commenting on this statement of respondent. Its implications are far-reaching. He wanted the Referee to believe that the creditors were getting off cheap in paying debtor $900.00 a week for

his living expenses; that debtor was complaining he should have more. Certainly, debtor must have been complaining because respondent's "average take" out of the weekly living expense allowance was roughly $200.00. Wouldn't this have been another occasion for respondent to have made a frank disclosure of what he was doing? Isn't the inference inescapable that respondent didn't want the Referee, and creditors to know that he was using the household allowance as a reservoir to collect fees? Isn't it apparent that by his every statement he wanted it known that Barrymore desperately needed every dollar for living expenses?

We feel that the foregoing statements made in open court by respondent constituted a fraud upon the Court and justified the Referee in making the order complained of. We further feel that had a disclosure been made to the Referee concerning the payments received by respondent, the weekly allowance for living expenses would not have been continued.

It is our view that the findings of the referee to the effect:

> "That neither the Court nor the creditors of the debtor, prior to about the 17th day of May, 1941, had knowledge of the payment of said sum of $5,950.00 by the debtor to the respondent. That if the Court had had knowledge of the making of said payments by the debtor to the respondent the amount of the allowance to the debtor for his living expenses would have been reduced and the Court would not have permitted any payments to be made by the debtor to respondent to apply upon the said purported agreement of September 26, 1940." [Rec. p. 108.]

are amply supported by the evidence in that the evidence permits of but one conclusion.

We respectfully submit the finding of the District Court to the effect that:

> "Said sums received by Roland Rich Woolley, as aforesaid, were the sole and unrestricted property of John Barrymore, paid to him without restriction or limitation." [Rec. p. 346.]

finds no support in the record. It is our view that on review the District Court cannot draw unnatural and unreasonable inferences from the evidence, and where but a single inference may be drawn from the evidence, the District Court is bound to follow that inference.

The Order of the Referee Was Based Upon Substantial Evidence and the Referee Was in a Better Position to Judge the Credibility of the Witnesses Than the District Court.

The general rule of law seems to be that findings of fact by the referee are conclusive unless clearly erroneous.

In re Dant & Dant, 39 Fed. Supp. 753;

Kessler v. Jefferson Syrup Corp., 125 Fed. (2d) 108.

The Circuit Court of Appeals for the Ninth Circuit definitely decided in *Weisstein v. Laughran,* 84 Fed. (2d) 419:

> "Appellee contends that the case having been tried before the Referee, and the Referee having found that the claimant was entitled to the possession of the canned fruit, that the District Judge could not upon the familiar rule that where facts are litigated before

the Referee and where the witnesses appeared before him and a decision upon the controverted facts has been made by him, the Court will not ordinarily be justified in reversing the findings of the referee as to controverted facts . . ."

In addition to the above cited case, the following decisions of this Court are all in favor of the petitioner's position:

In re Eastern Oil Company, 100 Fed. (2d) 341;
Carr v. Southern Pacific Co., 128 Fed. (2d) 764.

See also:

Newman v. Burnham, 126 Fed. (2d) 336.

It is our contention that if there was a conflict in testimony, the District Judge was bound by the Referee's finding, and if there was no conflict therein, the evidence was susceptible of but a single inference.

To logically pursue the second alternative first and assume no conflict existed in the evidence, it is our view that the following facts were presented:

A. The representation of debtor and respondent that the weekly allowance was for living expenses. [Rec. p. 113.]

B. The repeated statements to the Court by respondent of the necessity of maintaining a proper scale of living for debtor. [Rec. p. 417.]

C. The attempt by respondent to account to the Referee how the weekly allowance was being used. [Rec. p. 473.]

D. The fact that respondent was paying himself an attorney's fee out of the weekly allowance at the very time he was accounting for the use of the money but refrained from advising the Court that he was receiving funds from the weekly allowance. [Rec. pp. 345-6, 468, 469, 470.]

E. The finding of the Referee that the weekly allowance would have been cut had he knowledge of the fact that respondent was receiving substantial sums of money out of the same.

We readily admit that if this evidence is susceptible of two reasonable, but different, inferences, that the District Judge was in as good a position of drawing an inference as the Referee. However, if we were to postulate that all men are mortal and Socrates was a man, could we say that there could be drawn two equally reasonable inferences or conclusions from the foregoing major and minor premises? The answer, of course, is no. It is inconceivable how a reasonable mind could fine innocence, candor, and good faith in the record so far as respondent was concerned.

He was active in having the weekly allowance restored. [Rec. p. 378.] He was active in having it maintained. [Rec. p. 417.] He attempted to itemize its need, use, and disbursement. [Rec. p. 468.] He maintained silence when he should have spoken [Rec. p. 470], and he was putting money in his own pocket. [Rec. pp. 345-6.] His words ring in our ears:

> "You asked for it, Your Honor, and I am trying to give it to you." [Rec. p. 469.]

It would be sophistry on our part to cite authorities to this Court to the effect that the District Judge cannot substitute findings new and different from those of the Referee where the inference drawn by the District Judge is unreasonable, illogical, capricious and abusive of sound judicial discretion.

Respondent's intent and point of view is revealed by his own sworn testimony on August 1, 1941:

> "The Referee: I would like to ask you this question, Mr. Woolley: During the various proceedings had in the Barrymore matter numerous creditors or their representatives asked on numerous occasions that you furnish the Court with an itemized statement of the disbursements of the money allowed to Mr. Barrymore. Has that yet been filed in the case? A. No, it was never filed. It was never ordered by Your Honor.
>
> The Referee: I did not exactly order it. I suggested it. I did not think an order would be necessary. A. I don't recall Your Honor suggested it. I further heard Your Honor say on more than one occasion with regard to the funds turned over to Mr. Barrymore that that was not accountable to this Court, that that was a personal matter with him.
>
> The Referee: That is in a way true, but on what Mr. Barrymore did with his money would depend a great deal, in the mind of the Court, as to what the Court might allow him. It was recommended to the Court at the time these allowances were made that Mr. Barrymore needed this money for his support and maintenance, and it was on that theory, on that representation the Court allowed the amount he did allow. A. I was not in the case at the time the first order was made, and subsequently it was reduced from a

thousand to nine hundred, and when the arrangement was made in the first instance I was not in the case." [Rec. pp. 536-537.]

Again, on August 1, 1941, respondent testified:

"Q. Who eventually got the divorce? A. Well, we filed a complaint and then she filed a cross-complaint and negotiations were taken up with her counsel, Mr.—counsel didn't appear for a while and an application was made for fees, and then Mr. Giesler's office came into it, and extended negotiations were had with Mr. Giesler's office and Mr. Willner and then after the property settlement was finally entered into, as Your Honor will recall, I appeared here and mentioned that to Your Honor and Your Honor made a special order and allowed $2500 to be paid over to her in connection with that settlement, and so then after the settlement was allowed, as a matter of, I would say gentility, Mr. Barrymore allowed her to get the divorce." [Rec. p. 581.]

Yet, what actually happened in relation to the $2,500.00 was:

"The Referee: But the present Mrs. Barrymore, as I stated yesterday, has no standing in this Court. She is not a creditor. The Court is not considering her in any respect in determining the issue in this matter." [Rec. p. 385.]

On the reopening of the matter at the request of the Receiver [Rec. p. 671], he testified that after respondent stepped out of the case and the Referee had ordered him (the Receiver) to pay the personal bills of the debtor, that he received from respondent a number of unpaid bills that he subsequently paid out of the weekly allowance.

These bills are set out in the record. [Rec. pp. 703 and 739.] The reasonable inference to be drawn from this evidence is that debtor's bills could and would have been paid had not respondent used the money to pay himself a fee.

To counter this evidence and the inference resulting therefrom, respondent called as his witnesses his bookkeeper [Rec. p. 681] and a former housekeeper, secretary and employee of the debtor. [Rec. p. 753.] Without detailing all this testimony, it is clear that at least certain of the bills were in respondent's possession and could have been paid by him had he chosen to so do. [Rec. pp. 685-6.]

This merely served to create a conflict in the evidence from which the Referee found:

> "That the notice of motion of substitution of Gordon W. Levoy and Earl E. Moss for and in the place and stead of Roland Rich Woolley and Hiram E. Casey, as attorneys for the debtor in this matter, was served on said respondent on or about May 11th. That on or before January 15, 1941, said respondent had received a statement from Dr. Hugo M. Kersten showing a balance due for services to the debtor of the sum of $227.00, and on or about January 15, 1941, said respondent paid out of the debtor's funds on account of said amount due said Dr. Hugo M. Kersten the sum of $100.00. That between January 15, 1941, the date that Earl E. Moss and Gordon W. Levoy were substituted as attorneys for the debtor in the place and stead of respondent, respondent caused to be paid to himself to apply upon the fee in said divorce proceeding the sum of $2500.00, a small part of which would have been sufficient to pay the

balance due said Dr. Hugo M. Kersten. That sometime during the month of March, 1941, respondent, as attorney for said debtor, received a statement from one A. Vic. Durando for the sum of $260.00 on which respondent paid in March—$60.00, on April 8th —$25.00, on April 16—$10.00, April 24th—$10.00, and on May 3rd—$10.00, leaving a balance due of $145.00. That from March 11th to May 2nd, respondent caused the said debtor to pay respondent to apply upon said fee in said divorce proceeding the sum of $1800.00, and said bill due said A. Vic. Durando could have been paid out of the funds allowed the debtor for his maintenance." [Rec. pp. 109-110.]

We submit that whether one takes the view that the evidence was without conflict or adopts the position that there was a conflict, that as a matter of law, the findings of the Referee should be adopted. It makes little difference in our opinion for the reason that any fair and reasonable view of the record as a whole inescapably shows that the Court was imposed upon and the respondent used concealment and falsehood to obtain $5950.00. As indicated in our argument on the jurisdictional phase of this case, fraud on the Court is a basis of recovery in a summary proceeding. Fair minds cannot disagree on the proposition that the respondent deceived the Referee and benefitted personally from that deception and depleted the estate because the funds which were not used for debtor's living expenses were used to pay taxes and discharge the liens of creditors. [Rec. p. 201.]

In concluding our discussion of this point, we desire to direct the Court's attention to its right to exercise as wide a latitude in reviewing the Referee's findings as the District Judge.

> *The Morris Plan Industrial Bank v. Henderson,* 131 Fed. (2d) 975.

Under the authority of this case and those cited in the opinion, it is our view that this Court may sit in the same position as the District Judge in reviewing the findings of the Referee. In the cited case, at page 977, the Court speaking through Mr. Justice Learned Hand, said:

> "So far, therefore, as the words themselves leave any latitude, the Referee's conclusion ought to prevail because we cannot appraise the cogency of lost evidence. In the end, as we have often said, the responsibility for the right conclusion remains the Judge's, as indeed, it is ours . . . but we have again and again held that except in plain cases he should accept the referee's findings . . . We, therefore, hold that the question is the same in this Court as it was in the District Court."

Conflict of Decision Between Ninth Circuit and Decisions of Other Circuit Courts of Appeal.

We submit that the decision in this case is in conflict with *Governor Clinton, Inc. v. Knott, et al.,* ..... Fed. (2d) 149 C. C. A. 2, 1941).

After the Filing of a Petition in Bankruptcy, Including a Debtor's Petition Under Chapter XI of the Bankruptcy Act, the Person and Property of the Bankrupt or Debtor, Wherever Located, Is Within the Exclusive Jurisdiction of the Bankruptcy Court—in Custodia Legis—and Cannot be Removed or Alienated Without the Approval and Authority of the Court.

It is not necessary to look further than the Bankruptcy Act for the basis of the above statement. Applicable sections are as follows:

> "Sec. 311. Where not inconsistent with the provisions of this chapter, the court in which the petition is filed, shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located."

> "Sec. 312. Where not inconsistent with the provisions of this chapter, the jurisdiction, powers, and duties of the Court shall be the same . . . (2) where a petition is filed under Section 322 of this act, as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed."

These sections were all discussed and applied in the recent decision of *Weiss v. Fleetwood Bank*, 26 N. Y. S. (2d) 583 (1941), in which case, in 1939 the debtor corporation filed a petition under Chapter XI of the Bankruptcy Act and was permitted to continue in possession of its business. The defendant bank knew of this proceeding. After the filing of the petition, one Birnbaum, the chief officer of the debtor corporation, cashed five certified checks payable to the debtor on his endorsement "Murray

E. Birnbaum, Trustee." Further checks were drawn on the debtor's bank account. All money so obtained was used by Birnbaum for his own purposes. In the above action the trustee in bankruptcy sought to recover from the bank on the theory of conversion. It was urged that since the bank knew of the proceeding it had notice that Birnbaum was not trustee, and that all funds taken from the debtor's account were in *custodia legis* and could be removed only with approval of the court. In holding that the trustee might recover the funds wrongfully secured by Birnbaum, the Court made the following statements:

> "Under the act, the debtor is permitted to remain in possession and to conduct the business, but the title of the debtor is the title of a trustee. Section 342 . . . so here, the business and its assets, after the filing of the petition for an 'arrangement,' were not the property of the debtor, but were a trust fund under the control of the court."

Under former Section 75 of the Bankruptcy Act the same problem arose concerning the debtor in possession of physical properties in *Price v. Louisana Rural R. Corporation,* 38 Fed. Supp. 196 (D. C., W. D. of La., 1941). Here a debtor filed a petition in 1933 under Section 75 of the Bankruptcy Act. In 1936, while his estate was still in the process of administration, he leased a part of the real property for two years. The debtor then sought to enforce the lease. The defense was that the lease was void since the property was in *custodia legis* and the debtor had no power to contract regarding property of his estate during the course of its administration under a debtor

proceeding. In holding that the defense was valid, the Court made the following statement:

> "Price sought the power of the court then to protect him in his property (by debtor proceedings), and it follows that he should have known that he could not sell for a period of years as in a lease without the knowledge and authority of the conciliation commissioner and the court. This requirement is to assure that the proceeds of all transactions will be delivered to and placed in the custody of the court. The property, as is so aptly said in the decision, was in *custodia legis* (page 199) . . . There was a total want of legal capacity in Mr. Price to contract. The lease contract was void *ab initio.*" (Page 200.) (Statements in parenthesis added.)

Likewise the debtor herein was totally without capacity to contract to pay for services of respondent for procuring a divorce and that contract is absolutely void. If the debtor's contract for the payment of the $10,000.00 divorce fee was valid it could have been enforced against his earnings and this proceeding rendered ineffectual. If it could not have been so enforced then it is invalid and void.

The Court, in *McKesson & Robbins v. Morris Travis Drug Co.*, 106 Fed. (2d) 681 (C. C. A. 6th, 1939), was called upon to make a direct statement regarding the custody of property of the bankrupt after the filing of the petition in bankruptcy. Plaintiff filed an involuntary petition in bankruptcy against the defendant. There was pending at the same time a state court proceeding in which a receiver had possession of the property of the alleged

bankrupt. The jurisdiction of the Bankruptcy Court was thereupon attacked. In upholding the jurisdiction of the Bankruptcy Court it was stated at page 683, as follows:

> "The material question is, whether an act of bankruptcy was committed by the drug company, and if so, the estate is regarded as in *custodia legis* from the filing of the petition regardless of actual custody."

During the Course of Administration of the Estate of a Debtor, Such Debtor May Make No Contract Regarding the Property Being Administered by the Court—Any Effort to do so Is Void Ab Initio.

Returning to the decision in *Price v. Louisiana Rural R. Corporation,* 38 Fed. Supp. 196 (D. C., W. D., La., 1941), we find, in addition to the prior statement that the contract was void *ab initio,* the following:

> "There have been decades of use of the Federal statutes of bankruptcy, and all laymen with any degree of business experience, not to mention lawyers, well know that the last person who might exercise disposition over property placed in the custody of the federal court through bankruptcy is the debtor himself." (Page 200.)

In *Biggs v. Moors,* 63 Fed. (2d) 70 (C. C. A. 7th, Wis.), we find a limitation on the power of the bankrupt to pay an attorney's fee. The bankrupt earned certain money prior to filing his petition in bankruptcy. He did not receive it, however, until after his petition was filed. After the petition was filed, he assigned it to his

attorneys in payment for fees in the bankruptcy proceeding. The trustee moved for an order requiring the attorneys to turn over all fees so received to the bankrupt estate. In so ordering, the Court, at page 71 said.

> "the salary came into the hands of the bankrupt and his attorneys after the filing of the petition in bankruptcy. It should have been turned over to the trustee, and the attorneys should have filed their petition to have their fees fixed. Their position that, having seized the money, the trustee should be required to file a petition to test the reasonableness of their fees is not tenable."

In the Matter of Bergman, 25 Fed. Supp. 694 (D. C., E. D., N. Y., 1938), the Court held that a debtor in possession could not even employ a fifteen dollar a week assistant in her business without approval and authority of the Court. Regarding the item sought to be used as a credit the Court said:

> ". . . it represents a payment to the bankrupt's son and as she was not authorized by any order of the court or referee to make this disbursement, no reason appears why it should be allowed."

Applying this rule of law, how could the debtor herein incur obligations to pay $100.00 per week and also $10,000.00 without, not alone the approval of the Court, but even its knowledge or the knowledge of the beneficiaries of the trust estate, to-wit, the creditors?

V.

Conclusion.

In conclusion, we again urge this Court to take over this case by a writ of certiorari, in that, (a) it is important that this Court determine whether an adjudication in bankruptcy after the failure of an arrangement under Chapter XI will vest all of the subsequent earnings back into the debtor's hands, even though the same have been received by a Receiver under conditions which are for the benefit of the debtor; (b) the action of the lower courts, which are in conflict with the decision of the Circuit Court of Appeals in the case of *Governor Clinton, Inc. v. Knott;* and, (c) this Court should determine whether Section 378 of the Bankruptcy Act divests the Bankruptcy Court of jurisdiction over property that has already come into its possession.

We submit that if the writ is granted, the ultimate decision should reverse the decision of the Circuit Court of Appeals for the Ninth Circuit and the decision of the District Court of the United States for the Southern District of California.

Dated at Los Angeles, California, this 31st day of May, 1944.

BERTRAM H. ROSS,
B. E. AHLPORT, and
EARL E. MOSS,

By EARL E. MOSS,
Counsel for Petitioner.

APPENDIX.

In the United States Circuit Court of Appeals for the Ninth Circuit.

Samuel A. Miller, as Trustee in Bankruptcy of the estate of John Barrymoore, Bankrupt, appellant, vs. Roland Rich Woolley, appellee.

No. 10,460.

Mar. 20, 1944.

Upon appeal from the District Court of the United States for the Southern District of California, Central Division.

Before: Wilbur, Mathews and Stephens, Circuit Judges.

WILBUR, Circuit Judge:

This is an appeal from an order of the United States District Court reversing an order of the referee in bankruptcy which required the appellee to pay to the trustee in bankruptcy the sum of $5,950[1] which had been paid to appellee by John Barrymore as a part of the fee in a divorce case instituted by John Barrymoore while a proceeding for an arrangement between Barrymore and his creditors, under chapter 11 of the Bankruptcy Act, was in progress. Concurrently with the filing of his petition for arrangement, under 11 U. S. C. A. § 722, on June 5, 1940, the debtor, John Barrymore, filed a petition stating that he was earning $5,000 per week in his profession as an actor; that it had been his practice to expend approximately $1,000 per week for his "household and necessary ex-

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[1]The appellee has $619.65 additional in his hands which he consented to turn over to the trustee, and it was so ordered.

penses" and asked the court to "fix his drawing account from his earnings" and alleged that a reasonable drawing account pending a further order of court "as and for his living expenses herein and for his services herein should be and is the sum of $1,000 per week." The petition prayed that an order be made "fixing his drawing account for his household expenses and necessities at the sum of $1,000 per week, subject to the further order of this court." The order of the referee made on the same date ordered "that the drawing account of said debtor be and the same is hereby fixed in the sum of $1,000 per week, subject to the further order of this court."

During the pendency of the proceedings there were numerous meetings of the creditors before the referee. During these proceedings the disposition of the $1,000 per week paid the debtor was discussed.

On September 20, 1940, the debtor entered into a written contract wherein he agreed to pay to appellee Roland Rich Woolley the sum of $10,000 as a fee in a divorce suit to be instituted on his behalf by Mr. Woolley. On September 30th appellee Woolley and Hiram E. Casey were substituted as attorneys for the debtor in the arrangement proceeding. It should be observed that at the time the allowance of $1,000 per week was made by the court and at the time the contract for employment of appellee as an attorney in the divorce action was made the debtor was represented in the arrangement proceedings by other lawyers. So far as the representations are concerned which were made by the debtor to the referee in procuring the allowance in June, 1940, the appellee Woolley had no connection therewith nor responsibility therefor. Under the agreement made by Mr. Woolley with the debtor the allowance of $1,000 per week repaid to the debtor by the receiver in the arrangement proceedings was turned over

to appellee Woolley when received and disbursed by him on behalf of the debtor to pay expenses, each disbursement being approved by the debtor. Appellee had retained on account of his services to the debtor in the divorce case the sum of $5,950. The retention of these amounts was approved by the debtor.

The theory upon which the referee ordered appellee Woolley to pay over to the trustee in bankruptcy[2] the sum of $5,950 was that the weekly allowance to the debtor would not have been continued at so high a figure if the appellee had not concealed the fact that he was being paid attorney fees from the allowance. The trial court, upon review, considered and held that the money paid to the debtor as an allowance belonged to him and that the debtor's estate in the arrangement proceedings had no concern with the disposition the debtor made of the allowance.

Before proceeding further it should be stated that the law concerning arrangements (ch. 11, Bankruptcy Act) makes no provision for the payment of moneys to a debtor by way of allowances for living expenses. The power of the bankrutcy court in arrangement proceedings over the future earnings of the debtor is entirely dependent upon the arrangement proposed by the debtor in his petition for confirmation of the arrangement. The basic question then is, what was the arrangement proposed by the debtor and to what extent did the debtor yield jurisdiction over his future earnings. To determine this matter will involve

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[2]The debtor was declared a bankrupt after his death because the cessation of his earnings made it impossible to carry out the arrangement. 11 U.S.C.A. § 777.

some consideration of the proceedings before the bankruptcy court which we will state as briefly as may be.

The debtor owed the United States government $25,000 income tax for his fiscal year 1938, together with interest and penalties due to the default in payment. He owed over $5,000 for income taxes to the state of California. He owed large amounts of delinquent taxes to the county of Los Angeles. He also owed some preferred debts to laborers and others to general creditors. His assets were heavily encumbered with little prospect of any recovery therefrom for the benefit of general creditors. The only substantial source of payment of these obligations was money derived by the debtor from his current earnings which he estimated in his petition to be over $250,000 per annum. These earnings, as soon as realized, were subject to the lien of the United States government for the income taxes of 1938, amounting to about $30,000, and also gave rise to additional income taxes for the current year of 1940 for about the same amount as estimated,[3] and to California state income taxes, amounting to about one-fifth of the federal income taxes.

In his petition for the arrangement the debtor enumerated his property and his obligations and offered an arrangement to pay into court each week the sum of $1500 to be devoted to the payment of his general creditors, such payments to be continued until the creditors were paid in full. He also offered to pay all outstanding taxes. The claims for these taxes were preferred claims and were secured by tax liens upon all the property of the debtor.

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[3]The 1939 income taxes had been paid before debtor's petition was filed in the arrangement proceedings.

The debtor did not state how nor in what manner he would pay these taxes, but it is fairly to be inferred from his attitude at the time he secured his allowance of $1,000 per week from the court that he intended to pay into the court all his earnings, alleged to be $5,000 per week, and to have returned to him the sum of $1,000 per week. It is reasonable to say that his proposal as made in his petition for the arrangement contemplated the payment to the receiver of his estate of all his wages on condition that he be repaid the sum of $1,000 per week.

As to the amounts which were to be paid for taxes, the federal and state governments were interested in the proceedings although the court had no authority over these preferred claims except to see that their priorities were preserved.[4] The general creditors were interested in the

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[4]11 U.S.C.A. § 707. Creditors; debts; claims. Unless inconsistent with the context and for the purposes of an arrangement providing for an extension of time for payment of debts in full and applicable exclusively to the debts to be extended—

(1) "creditors shall include the holders of all unsecured debts, demands, or claims of whatever character against a debtor, whether or not provable as debts under section 103 of this title and whether liquidated or unliquidated, fixed or contingent; and

(2) "debts" or "claims" shall include all unsecured debts, demands, or claims of whatever character against a debtor, whether or not provable as debts under section 103 of this title and whether liquidated or unliquidated, fixed or contingent.

11 U. S. C. A. § 756. Modification of rights of unsecured creditors. An arrangement within the meaning of this chapter shall include provisions modifying or altering the rights of unsecured creditors generally or of some class of them, upon any terms or for any consideration.

11 U. S. C. A. § 771. Discharge of unsecured debts upon confirmation. The confirmation of an arrangement shall discharge a debtor from all his unsecured debts and liabilities provided for by the arrangement, except as provided in the arrangement or the order confirming the arrangement, including the claims specified in section 754 of this title, but excluding such debts as, under section 35 of this title, are not dischargeable.

discharge of these overriding liens. The unsecured claims had no right to payment from current or future earnings of the debtor.[5] It is to say that the arrangement tendered by the debtor, as qualified by the accompanying petition for an allowance of $1,000 per week from his future earnings was one in effect to pay over to the receiver all his earnings except $1,000 per week, although his proposed "arrangement" was to pay only $1,500 per week, from which he requested his allowance of $1,000 per week. To state it somewhat differently, it was a proposal to retain $1,000 per week and to pay $500 per week to the receiver for the general creditors, and the balance of the debtor's earnings to go to pay his obligations to the state and federal governments and other secured or preferred claims.

No creditor questioned the right of the debtor to retain the moneys paid to him weekly by way of an allowance, but during the progress of the proceedings it was suggested by some of the creditors to the referee and also by the referee that perhaps this amount was too large, and inquiries were made as to the disposition and need of it, but these inquiries were directed largely to the question of the acceptance by the creditors of the proposed arrangement and the three amendments to the arrangement

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[5]11 U. S. C. A. § 752. Rights, duties and liabilities of creditors, etc. Where not inconsistent with the provisions of this chapter, the rights, duties and liabilities of creditors and of all other persons with respect to the property of the debtor shall be the same, * * * where a petition is filed under section 722 of this title, as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed.

In re Leibowitt, 93 F. 2d 333, 335. Wages of a bankrupt after adjudication are not subject to claims of the estate.

originally proposed. During this period negotiations were carried on in open court between the creditors and the debtor's attorneys and the United States government concerning the acceptance of the proposed arrangements as modified from time to time by the debtor to meet the objections of the creditors. It was not until June 19, 1941, slightly more than a year after the original petition was filed and after the debtor had paid the receiver over $100,000 from his earnings in anticipation of the acceptance of his plan or arrangement by his creditors and confirmation by the court, that the third amended proposed arrangement was consented to and confirmed by the court. No accounting was made or required by the court as to the sum returned to the debtor by the receiver under order of court; the confirmation dealt only with the money in the hands of the receiver and with the debtor's future earnings.

The first amended proposed arrangement, filed February 7, 1941, provided that "all earnings of the debtor * * * earned and payable after the adoption and approval of this plan" subject to certain deductions specified should be paid to the custodian or disbursing agent. It was proposed by the debtor that from his earnings a weekly sum of $600 be paid to the debtor and that an additional sum of $400 per week be placed in a reserve fund to be paid to the debtor if and when his earnings were insufficient to pay him the $600 per week. It was stated: "It is the intention and purpose to provide petitioner with $600.00 per week for his personal living expenses so long as he may either earn said amount or there shall be in said special reserve fund an amount sufficient to permit the payment of the said $600.00 per week to your petitioner."

On March 18, 1941, an amendment to the amended proposition of the debtor was filed. This also provided for the payment of $600 per week to the debtor, $200 per week for his children, and $400 per week to be paid into the reserve fund. Payments in the reserve fund were to continue until the amount in the reserve was equal to $7500. Subsequent payments were to be limited to the amounts necessary to continue the reserve at $7500. The amendment to the first amended proposition for the arrangement made March 18, 1941, eliminated the provisions with reference to "his personal living expenses" and provided directly for the payment of $600 per week to the debtor and $400 per week in the reserve fund without any statement that the weekly payments were for living expenses. The next day, March 19, 1941, the referee made an order directing that $600 per week be paid to the debtor in place of any amount theretofore paid to him on account of his personal expenses. Three hundred dollars per week was ordered paid into a special fund "to be earmarked as a reserve account to be used for such purposes as the court may hereinafter direct by a further order."

The second amended proposition, filed April 9, 1941, provided for the payment to the debtor of the sum of $700 per week, $200 a week additional to support debtor's children, and $400 per week to be paid into the reserve fund. Nothing is said as to the purpose for which this money is to be paid to the debtor except that in the proposed amended arrangement it is stated that "heretofore the referee herein fixed the sum of $1,009.00 per week as a reasonable amount for the support and maintenance of petitioner"; that the amount had thereafter been reduced to $900, and later to $600, plus a reserve of $300 per week.

In the meantime the receiver filed reports and accounts showing that he had received altogether from the earnings of the debtor during the pendency of the proposed arrangement $106,536.18, and that he had disbursed $72,254.97, leaving the balance on hand, $34,281.21. On May 17, 1941, an order was made substituting other attorneys for the debtor in the place of the appellee and Hiram Casey.

On June 19, 1941, an order was made approving, with modifications, the plan of arrangement as embodied in the second amended proposition, and providing that all future earnings of the debtor should be paid into a general fund and disposed of in accordance with the provisions of the order of confirmation and providing for the payment to the debtor of the sum of $700 per week, the court reserving the right to modify the weekly payment for any reason. It provided for the payment of $200 a week for the maintenance of the debtor's children, for the payment of $400 per week into the reserve fund to be applied on the weekly payments to the debtor and his children or otherwise as the court might direct.

It will be observed that there was no argreement or obligation upon the part of the bankrupt to pay any money upon his proposed plan of arrangement until the confirmation of his plan of arrangement on June 19, 1941.

The earnings of the debtor, whether deposited with the court or retained by him, were subject to the tax lien of the federal government, aggregating over $25,000. All the moneys paid out by the referee from the funds were subject to the lien of the federal government in the hands of the payees or transferees if they took with actual or constructive knowledge of the lien. (26 U. S. C. A. §§

3670, 3672; see Investment and Securities Co. v. United States, decided by this court February 16, 1944.)

It was not until the federal government had received payments from the accumulated earnings of the debtor in full satisfaction of its claims that the moneys paid to the appellee and to others were finally relieved of the tax lien for the taxes of 1938.

Another factor to be considered is that the debtor died on May 29, 1942, before the arrangement confirmed on June 19, 1941, had been fully carried out; that on July 1, 1942, the deceased debtor was declared a bankrupt as permitted by 11 U. S. C. A. § 26. We need not discuss the effect of this adjudication of bankruptcy, which is not discussed in the briefs, further than to state that the bankruptcy adjudication by the terms of the statute related back to the filing of the original petition for the arrangement on June 5, 1940, and, consequently, the earnings of the debtor thereafter, that is, from June 5, 1940, to July 1, 1942, under bankruptcy proceedings belong to him subject only to liens for taxes and to the rights of attachment or garnishment by those having claims which cannot be discharged in bankrutpcy. The order of the referee requiring the appellee to pay $5,950 to the trustee in bankruptcy was made on September 25, 1942, nearly three months after the status of the bankrupt and the creditors had been changed by the adjudication in bankruptcy.

The proceedings which resulted in the order appealed from were initiated by the debtor on October 3, 1941. In this petition he alleged that he had agreed to pay the appellee $10,000 for his services as attorney at law in the divorce case which he was to institute for the debtor and

that the fee of $10,000 was to cover the petitioner's services in the arrangement proceedings in the bankruptcy court as well as in the divorce proceeding to be instituted and that the appellee had paid himself from the funds of the debtor without the approval or knowledge of the court. The debtor asked that the fee be reduced proportionately and the balance be returned to the petitioner or the receiver.

This petition was answered by appellee on October 17th. The appellee set out the written agreement between the parties which showed the fee did not include services in the arrangement proceedings. On October 27, 1941, the debtor amended his petition alleging that the contract with appellee for his services in the divorce matter was not approved by the court and that the court was not informed of the fact that moneys paid to the debtor "for his living expenses" were being applied to the payment of said attorney's fees. The appellant alleged that the various allowances made to him for his living expenses were made by the court upon the representation by appellee that the sums so allowed were necessary for petitioner's maintenance and that the fact that during said period of time appellee paid to himself out of said funds the sum of $6,900 was concealed from the court. The prayer was that the money be repaid to the receiver in the arrangement proceedings.

The receiver, after asking for instructions, intervened in the proceeding instituted by the debtor and the debtor's newly substituted attorneys notified the referee that in their opinion the fund of $5,950 should be ordered returned to the estate on the ground that the debtor's contract for the payment of the fees to the appellee was void

because not approved by the court and that in maintaining the high allowance granted to the debtor the court was not advised that part of the funds were being used to pay the attorney's fees of appellee.

The question as to whether or not a $10,000 fee in the divorce matter was exorbitant or whether the agreement therefor was obtained by fraudulent misrepresentations as to the amount of labor involved in the divorce case has been eliminated from the case, no allegations upon that subject being contained in the amended pleadings upon which the matter was tried. No evidence was introduced as to what would constitute a reasonable fee in the divorce case. It appears the debtor made the contract without questioning the reasonableness of the fee and only raised the question when the divorce was obtained without contest because of his default upon the cross-complaint of his wife. If the money paid to the appellee on behalf of the debtor was the debtor's own money to do with as he saw fit, as we believe and hold, the question of whether or not the continuance of the order making the so-called allowance to the debtor resulted from concealment of facts is immaterial, and there is no basis for requiring the repayment to the bankrupt estate of the moneys repaid to the debtor in the form of an allowance. It was his money both before and after the order. It is true that until an accounting was requested by the referee the appellee did not disclose to the court that he was being paid large amounts from such allowance for attorney's fees. No concealment was practiced except such as was involved in the failure of the attorney to advise the court that he was receiving this money. The statements of appellee that the moneys to be paid to the debtor were necessary for his

expenses were in most instances made in discussion of the proposed plan of arrangement and not with reference to the disposition of the money theretofore repaid to the debtor. Certain items of past expense were stated to the court with reference to servants, housekeeping expenses, etc., paid by the debtor, but in no instance did these amounts cover or purport to cover the entire allowance of $1,000 per week and in no instance did the court require a statement or the introduction of evidence on the subject of the disposition of the entire allowance until about August, 1941, when appellee filed a detailed statement showing, among other things, the payment of the $5,950 to him for attorney fees. While it is a matter of acute interest to the appellee, we deem it unnecessary to discuss the question of professional ethics as to how far an attorney, under such circumstances, is bound by his obligation to maintain the secrets of his client and how far he is bound by his obligation not to deceive the court. In any event there is no basis for the order requiring the appellee to refund moneys paid to him by the debtor from his own funds under a valid contract of employment.

As to the jurisdiction of the court to compel the appellee to repay money paid to him by the bankrupt, it is clear that if the money so paid to appellee belonged to the debtor, as we hold, the court had no jurisdiction to order it paid to the trustee in bankruptcy. The real contest is between the debtor and the appellee. The question as to whether the order of allowance in the arrangement proceedings did or could limit the debtor's use of the funds

allowed him if doubtful before the adjudication of bankruptcy is set at rest by a retroactive adjudication in bankruptcy which freed his earnings so far as the jurisdiction of the bankruptcy court is concerned from the claims of the bankruptcy court over his property.[6]

Order affirmed.

(Endorsed:) Opinion. Filed Mar. 20, 1944. Paul P. O'Brien, Clerk.

---

[6]11 U. S. C. A. § 778. Procedure upon order directing that bankruptcy be proceeded with. Upon the entry of an order directing that bankruptcy be proceeded with— * * *

(2) in the case of a petition filed under section 722 of this title, the proceeding shall be conducted, so far as possible, in the same manner and with like effect as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered on the day when the petition under this chapter was filed; and the trustee nominated by creditors under this chapter shall be appointed by the court, or, if not so nominated or if the trustee so nominated fails to qualify within five days after notice to him of the entry of such order, a trustee shall be appointed as provided in section 72 of this title.

In re Leibowitt, 93 F. 2d 333, 335. Wages of a bankrupt after adjudication are not subject to claims of the estate.

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CLERK

IN THE

Supreme Court of the United States

October Term, 1943

No. 146

SAMUEL A. MILLER, as Trustee in Bankruptcy of the Estate of John Barrymore, Bankrupt,

Petitioner,

vs.

ROLAND RICH WOOLLEY,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

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Statement of Case.

The petition of the petitioner for writ of certiorari sets forth the proceedings had before the Referee in Bankruptcy in a disconnected manner. We feel that in view of the issues raised in the petition, your Honorable Court would grasp the facts more readily if our answer to the petition presented the facts in the order of their occurrence before the Bankruptcy Court. We have, therefore, assembled the pertinent portions of the transcript of the record which have a bearing upon the issues raised by the petitioner. We will interpolate com-

ments on the facts as presented and such comments will be within brackets. (All italicized portions of the record are ours.)

On June 5, 1940, John Barrymore, now deceased, through his then attorneys, filed a Petition for Arrangement Under Chapter XI of the Bankruptcy Act. The pertinent portions of said petition are as follows:

"PETITION FOR ARRANGEMENT UNDER CHAPTER XI OF THE BANKRUPTCY ACT.

* * * * * * * *

"The petition of John Barrymore * * * by occupation actor, respectfully shows:

* * * * * * * *

"3. Your petitioner is unable to pay his debts as they mature and proposes the following arrangement with his unsecured creditors:

"a. To pay in full, as may hereafter be ordered by the Court upon confirmation of his plan of arrangement, all costs of administration herein.

"b. In the same manner and pursuant to an order of this Court upon the confirmation of his plan of arrangement, to pay all taxes in full due or owing to any taxing agency of the United States or State of California.

"c. To pay in full all wage claims and other debts having priority under the laws of the United States or the (2) laws of the State of California.

"d. To pay all of his unsecured creditors the full amount of their claims as finally approved and allowed, payable in the manner following, to-wit: In weekly payments of One Thousand, Five Hundred ($1,500.00) Dollars beginning thirty (30) days after the date of confirmation of your petitioner's plan of arrangement, and a like sum each and every week thereafter, *providing debtor is employed and engaged in his profession, until all of said unsecured creditors have been paid in full.*

* * * * * * * *

"5. The schedule hereto annexed, marked Exhiibit 'B' and verified by your petitioner's oath, in so far as it is possible to ascertain, contains an accurate inventory of all of his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

* * * * * * * *

"JOHN BARRYMORE
Petitioner.

JOSEPH SCOTT and
A. H. RISSE
JERRY GIESLER and
MEYER M. WILLNER
Attorneys for Debtor."

[Rec. pp. 2, 3 and 4.]

At the same time, by his then attorneys, Mr. Barrymore filed a petition containing the following allegations

and designated "Petition of Debtor to Fix His Compensation." Its pertinent provisions are as follows:

"PETITION OF DEBTOR TO FIX HIS COMPENSATION.

"The Petition of John Barrymore respectfully shows and represents:

I.

"That your Petitioner is a Debtor and is an Actor and is employed by the Twentieth Century Fox Studios.

II.

"That the *earnings* of your Debtor grosses approximately $5,000.00 per week; that your Petitioner has heretofore expended approximately $1,000.00 per week as *and for his household and necessary expenses;* that your Petitioner desires to have this Court, in accordance with its Orders heretofore made, *fix his drawing account from his earnings,* and in this respect your Petitioner alleges that he devotes all of his time, skill, and energy to his profession as an Actor.

III.

"Your Petitioner alleges *that a reasonable drawing account pending the further Order of this Court as and for his living expenses herein and for his services herein* should be and is the sum of $1,000.00 per week.

* * * * * * * * *

"JOHN BARRYMORE
Petitioner
"JOSEPH SCOTT & A. H. RISSE
JERRY GIESLER & MEYER M. WILLNER
"Attorneys for Petitioner.

(Duly Verified.)"

[Rec. pp. 112 and 113.]

(Comment: It will be noted from the foregoing that the Petition for Arrangement schedules an inventory of all of Barrymore's property, both real and personal, and makes an offer to pay

(a) All taxes due the United States or the State of California;

(b) To pay in full all wage claims;

(c) To pay all unsecured creditors.

(There are two classes of assets that Barrymore had under consideration, namely (1) all of his real and personal property owned by him as of the date of the filing of the petition, and (2) his future earnings which Barrymore stated grossed approximately $5,000 per week.

The petition of Barrymore to fix his compensation designates the $1,000.00 per week requested to be paid to him out of his future earnings as a fund to be used "for his household and necessary expenses" and as a "drawing account from his earnings", and Barrymore in the third paragraph of the petition to fix his compensation, requests that he be paid out of his future earnings "a reasonable drawing account pending the further order of this (Bankruptcy) Court as and for living expenses * * * and for his services", and states this sum should be $1,000.00 per week. It will be observed that the request of Barrymore is not for a payment out of the real and personal property owned by him at the date of the filing of the petition under Chapter XI, but is a sum to be paid to him out of future earnings.)

After the presentation of the petition under Chapter XI and the petition by Barrymore to fix his compensation, the Bankruptcy Court made the following order:

"ORDER FIXING COMPENSATION OF DEBTOR.

"Upon reading and considering the verified Petition of John Barrymore, the Debtor above named, and good cause therefor appearing, now, therefore,

"It Is Hereby Ordered, Adjudged, and Decreed *that the drawing account of said Debtor be and the same is hereby fixed in the sum of $1,000.00 per week, subject to the further order of this Court.*

"Dated this 5th day of June, 1940.

"ERNEST R. UTLEY
Referee"

[Rec. pp. 113 and 114.]

The record shows, without conflict, that payments at the rate of $1,000.00 per week were paid to Barrymore beginning June 6, 1940.

On August 2, 1940, an amended order was made by the Bankruptcy Court to make provision for the support of minor children of Barrymore. The pertinent part of this amended order reads as follows:

"AMENDED ORDER FIXING DRAWING ACCOUNT OF DEBTOR.

* * * * * * * *

"It Is Hereby Ordered, Adjudged and Decreed, that, subject to the further order of this Court, *the drawing account* of John Barrymore, debtor herein, be and the same is hereby fixed in the sum of One Thousand Hundred Seventy-five Dollars ($1,175) per week, commencing as of July 31, 1940, and

"It Is Further Ordered, Adjudged and Decreed that Samuel A. Miller, receiver herein, disburse said One Thousand One Hundred Seventy-five Dollars ($1,175) as follows:

"(1) One Thousand Dollars ($1,000) thereof to John Barrymore, debtor herein,

"(2) One Hundred Twenty-five Dollars ($125) thereof to Dolores Costello Vruwink, to be used *solely for the support and maintenance of John Blyth Barrymore, Jr. and Dolores Barrymore, minor children of debtor herein,*

"(3) Fifty Dollars ($50) thereof to John McKim Minton, Jr., trustee, *to be used solely for the support and maintenance of Diana Barrymore, a minor child of debtor herein;*

* * * * * * * *

"Dated this 2 day of August, 1940.

"ERNEST R. UTLEY
Referee in Bankruptcy"

[Rec. pp. 114, 115 and 117.]

(Comment: It will be noted that this amended order was designated "Order Fixing Drawing Account of Debtor" and in the body of the order it was designated as the "drawing account" of John Barrymore. This order directs the payment of $1,000.00 per week to Barrymore without reservation or restriction as to its use or purpose while the money being paid to the parent and trustee, respectively, of the minors specifically restricted the use of

the money providing that it be used "solely for the support and maintenance of" said minors.)

(It is agreed that the record shows, without conflict, that during this period, that is, from June 5, 1940, up to September 30, 1940, Barrymore had as his attorneys Mr. Joseph Scott, Mr. Jerry Giesler, and their associates, and that the respondent, Roland Rich Woolley, did not represent Barrymore in the bankruptcy proceedings until an order was made by the United States District Court on September 30, 1940, substituting Mr. Woolley and Hiram Casey as the attorneys for Barrymore in the bankruptcy proceedings.)

The order granting substitution of attorneys is as follows:

> "ORDER GRANTING SUBSTITUTION OF ATTORNEYS.
>
> "This matter coming before the Court for hearing on motion of the Debtor for substitution of attorneys, pursuant to notice filed Sept. 24, 1940; Roland Rich Wooley and Hiram Casey, Esqs., being present; there being no appearance in opposition.
>
> "Attorney Casey makes a statement. It is ordered that substitution of attorneys be granted as prayed. [114]" Sept. 30, 1940. [Rec. p. 119.]

On about September 20, 1940, Barrymore was having domestic differences with his then wife, Elaine Barrie Barrymore. On September 20, 1940, Barrymore employed the respondent, Mr. Woolley, to represent him to file

divorce proceedings. The agreement between Barrymore and Mr. Woolley reads as follows:

"September 20, 1940.

"Roland Rich Woolley, Esq.,
Attorney at Law
649 South Olive Street
Los Angeles, California

Dear Mr. Woolley:

"I hereby employ you as my counsel to file divorce proceedings against my wife, Elaine Barrie Barrymore, and to take such action in connection therewith as you may from time to time deem fit, subject, of course, to my approval.

"I further employ you to advise with me generally with respect to all my business and financial affairs.

"For your services in connection with the divorce proceedings aforesaid I agree to pay you the sum of $10,000.00, which shall include all your services in connection therewith up to and including the conclusion [23] of the trial of said action in the Superior Court of the State of California, in and for the County of Los Angeles.

"In respect to other and sundry services which you may render in connection with other matters, I agree to pay you a reasonable fee.

"Sincerely,

JOHN BARRYMORE.

"Approved:
ROLAND RICH WOOLLEY."

* * * * * * * *

[Rec. pp. 333-334.]

(Comment: This employment in the divorce proceedings by Barrymore of Mr. Woolley was ten days before Mr. Woolley and Mr. Casey became the attorneys for Barrymore in the bankruptcy proceeding.)

The record [p. 141] shows that from June 5, 1940 to September 18, 1940, the Receiver had paid Barrymore a total of $15,000.00 under the order of June 5, 1940 and the order of August 2, 1940, exclusive of weekly payments made to his minor children. The record shows [p. 138] that the Receiver had been paid the total sum of $32,-784.84 between June 5, 1940 and September 26, 1940, by Barrymore out of his earnings as a moving picture actor and radio performer.

(Comment: Throughout the proceedings, that is, from June 5, 1940, until May 12, 1941, when the respondent, Mr. Woolley, and his associate, Hiram Casey, were substituted out of the case by Barrymore, the payments to Barrymore by the Receiver were pursuant to the orders of June 5, 1940 and August 2, 1940. In November 1940 the weekly payment was voluntarily reduced to $900.00 and in March 1941 a reserve of $300.00 per week was set up out of earnings. At no time was there ever an order made by the Bankruptcy Court in any way modifying or restricting the free and uncontrolled disposition by Barrymore of the weekly payments made to him by the Receiver pursuant to said orders. Furthermore, the record will show that at no time during the entire proceedings from June 5, 1940 to the present date has there ever been a demand made or proceedings instituted to have an accounting made of the disposition of and the purposes for which the proceeds of the weekly payments to Barrymore were used, including the $15,000.00 paid to him between June 5 and

September 30, 1940, and while Barrymore was represented by other counsel. The only money for which an accounting is sought is the sum of $5,950.00 paid by Barrymore to respondent, Mr. Woolley, out of Barrymore's drawing account for legal services rendered Barrymore in the divorce case.)

The record shows that from June 5, 1940 until respondent, Mr. Woolley, and Mr. Casey were substituted out of the case, there had been paid to Barrymore pursuant to the orders of June 5, 1940 and August 2, 1940 over $40,000.00 and during that time [Rec. p. 194] Barrymore had earned $107,000.00.

The hearing of October 23, 1940, which was held less than four weeks after respondent, Mr. Woolley, became the attorney of record for Barrymore in the bankruptcy proceeding, is typical of the attitude of the Referee and the creditors respecting the drawing account of Barrymore. The record shows that prior to October 23, 1940, Barrymore's weekly drawing account of $1,000.00 had been held up by oral direction of the Referee, because Barrymore was unemployed. The following proceedings were had at the hearing on October 23, 1940, in the Bankruptcy Court:

"Los Angeles, California
Wednesday, October 23, 1940
10:00 o'clock, A.M. Session

"The Referee: John Barrymore.

* * * * * * * *

The Referee: Is Mr. Barrymore working now?

Mr. John Barrymore: Yes.

The Referee: And that is under the new arrangement with what company?

Mr. Barrymore: The Universal.

* * * * * * * *

The Referee: How much money is coming in a week now?

* * * * * * * *

Mr. Ahlport (attorney for Receiver): That is my recollection. It is coming in at that rate of $5,000 a week.

The Referee: Upon checking on that with the Receiver I am willing to restore the old arrangement (referring to the order of June 5, 1940).

* * * * * * * *

The Referee: You may prepare an order restoring the previous order to Mr. Barrymore, both to Mr. Barrymore and the children. (Referring to the orders of June 5 and August 2, 1940. However, the records show that said order had not been vacated or set aside by any order of the Referee at this time and remained in full force and effect, except as hereinafter mentioned, until June 19, 1941.)

Mr. Ahlport: Very well. [Rec. pp. 366, 367, and 368.]

* * * * * * * *

"The Voice: I represent one of the unsecured creditors. Does your Honor mean to restore it at this time or make it retroactive to take up the weeks during which I think your Honor was holding the order up? I think if additional funds be not distributed, in case of a formal bankruptcy, it may well result in—

The Referee: Here is the theory on which the Court suspended the order. There was a delay in offering the plan. *The Court had no assurance at that time that a plan (6) would ever be offered, and*

there was a possibility also of a straight adjudication. Of course, if Mr. Barrymore had asked for an adjudication any earnings he would make since the date of the filing of the petition would not be an asset in the case, and it was on that theory that I thought the Court should be liberal as long as funds are coming into the estate, to allow a reasonable amount to him to meet living expenses. You cannot expect a man to work without that.

Mr. Woolley: We have been subjected to a great deal of deprivation since the order was made cutting off the allowance. You cannot kill the goose that is laying the golden egg.

* * * * * * * *

The Referee: Under the circumstances seeing there is income coming in again — my thought in cutting off the order when I did was with the thought of not depleting the estate."

* * * * * * * *

[Rec. pp. 368, 369 and 370.]

"Mr. Miller: We got a check last week for $2500 which was for three days, and the check which I will get either today or tomorrow will be for a full week of $5,000. Then in addition, your Honor, there have been some receipts,—$2200 from one broadcast which I received and $1100 from another broadcast which I have not received but I will get.

The Referee: Beginning with the week you began to receive these or if a proportionate week a proportionate allowance may be made.

Mr. Miller: On the basis of the original order? [The order of June 5, 1940.]

The Referee: Yes. The original order may be restored effective with the date you commenced to receive the funds.

Mr. Woolley: Why should Mr. Barrymore be penalized for the period in between from the time he was cut off up to the time the funds began to come in? Mr. Barrymore has been trying his best, your Honor please.

The Referee: That would amount to a depletion in the [8] estate. I don't think the Court at this time would be warranted in going that far. It may be circumstances will develop later which would warrant a further modification of the order but I do not think so now, especially in view of the fact there is another delay asked for in the offering of the plan.

Mr. Woolley: I said before we came in Mr. Barrymore *had proposed voluntarily to turn over his personal earnings provided such an allowance would be given to him.* That was the reason why in the first instance proposals were included in the petition and he made that suggestion. Now it would seem that since he is trying to work out that plan —

The Referee: The Court is not making an order which would amount to a denial of your request at this time. It is without prejudice to your right to renew it at a later time.

Mr. Woolley: Very well." [Rec. pp. 370 and 371.]

"The Referee: If the Court makes any allowance to Mr. Barrymore for the time that he was cut off it will be because *of his earnings since the Court eliminated that item, and for no other reason.* Are there any creditors who wish to be heard from on this matter?

* * * * * * * *

The Referee: * * * Are there any objections to the granting to Mr. Barrymore of this $2500 which the Court deprived him of during the period he was not working?"

* * * * * * * *

[Rec. pp. 378 and 379.]

(Comment: The proceedings at this hearing of October 23, clearly demonstrate that

(a) The Referee in Bankruptcy was ordering money paid by the Receiver as long as Barrymore was employed and earning money. And that payments were not based upon his personal requirements which of course continued irrespective of earnings.

(b) That the current earnings of Barrymore were not an asset of the bankrupt estate.

(c) That the payments being made by the Receiver were being ordered by the Referee pursuant to the original order of June 5, 1940. The $2500 was ordered paid by the Referee not on the suggestion or representation of respondent, Mr. Woolley, or his associates but on the Referee's own initiative when he was satisfied that Barrymore was being paid out of current earnings and was not depleting his estate.)

The record shows that in the proceedings before the Referee in Bankruptcy, Barrymore's divorce proceeding in the State of California was discussed on October 9, 1940, November 6, 1940, November 7, 1940, November 26, 1940, March 18, 1941, and April 21, 1941, and that extensive legal services were being performed by the respondent, Mr. Woolley, on behalf of Barrymore in the divorce proceedings. [Rec. pp. 373, 378, 384, 385, 388, 438, 439, 497, 500.]

Typical of the discussion of the divorce proceedings was the following taken from the hearing, Wednesday, November 6, 1940:

"The Referee: John Barrymore.

Mr. Casey: Ready. The first matter we would like to take up, more or less informally, is the question that has been heard on the payment at this time to Mr. Barrymore of the two or three weeks at a thousand dollars a week he had not received during the time he was not working in the interim. The reason we are particularly renewing this at this time and urging the order be made and releasing that amount to Mr. Barrymore at the present time is two-fold: First, we think that under the plan offered and the agreement to be made and the fulfillment of it, out of which contracts $20,000 is earned, that he really is legally and morally entitled to have that amount inasmuch as it is necessary for him to have it to maintain himself. Then we have reached the *stage in settlement with his present wife, Mrs. Elaine Barrie Barrymore, where this is very advantageous to Mr. Barrymore himself, and naturally will inure to the benefit of the general creditors and the secured creditors, too, because if there is a prolonged quarrel going through the divorce courts between Mr. Barrymore and Mrs. Barrymore it will be not only expensive to handle but highly detrimental to his ability to keep and make new film contracts. In other words, publicity would be detrimental to his (3) general standing with the public.* The public, we know from experience, does not like it. We are

now in a position where we can make a settlement with Mrs. Barrymore which is very advantageous but in order to do it we need more money than Mr. Barrymore has at present, more cash. If we had this $2500 which we feel he is entitled to out of the moneys he earned,—he earned $20,000 on his radio contracts, on top of which he earned $3600 or something like that, and he has some radio money coming in and at this time we would like to make that as a motion directed to the Court that the sum of $2500 be released at this time to him to take care of those two and one-half weeks which he had not drawn." [Rec. pp. 373 and 374.]

(Comment: This discussion by Mr. Casey, associate of respondent, Mr. Woolley, indicates that Barrymore had been denied his payments of $1000 per week for two and one-half weeks prior to November 6 (1940), and counsel were calling to the attention of the Referee that Barrymore was entitled to receive $2500.)

The following proceedings were then had on November 6, 1940:

"The Referee: Mr. Miller, how much money have you received since Mr. Barrymore went back to work?

* * * * * * * *

The Referee: That makes about a total, when you get the $5,000 and the $2,200 of about $22,950, that you have received since the Court cut off that allowance.

Mr. Miller: That is right, your Honor." [Rec. pp. 374 and 375.]

The hearing of November 7, 1940 hereinafter quoted, further clarifies the position of the Referee respecting the reasons for the payment of the $2,500.00:

"Los Angeles, California,
Thursday, November 7, 1940.
10:00 o'clock, A.M. Session

* * * * * * * *

"Mr. Durst: I would like to inquire, I read in the newspapers there is to be a settlement with Mrs. Barrymore of some sort. What is the situation regarding that?

Mr. Casey: I think as the Court stated yesterday Mrs. Elaine Barrymore has nothing to do with these proceedings, as such. I am perfectly willing to answer your question. We announced it here yesterday and stated that and the Court stated at that time she could not participate here and her desires made no difference. We will put through a settlement with her.

* * * * * * * *

The Referee: But the present Mrs. Barrymore, as I stated yesterday, has no standing in this court. She is not a creditor. The Court is not considering her in any respect in determining the issue in this matter.

Mr. Durst: To determine the issue of whether Mr. Barrymore is to be given the $2500?

The Referee: That is the matter before the Court. It was disclosed yesterday that Mr. Barrymore since

the Court had stopped his allowance had brought into the estate with his work and efforts since something in the neighborhood of $20,000. The question arose as to whether or not he should be paid money for the time, *on the weekly allowance for the time the Court withheld it from him.*" [Rec. pp. 381, 384 and 385.]

(Comment: The Bankruptcy Court makes it very clear that:

(a) It was not recognizing any of the claims of Mrs. Elaine Barrymore in the bankruptcy proceeding to the assets of the bankrupt.

(b) That the Bankruptcy Court divorced itself completely from the State Court divorce proceedings in which Mr. Woolley was the attorney for Barrymore but at the same time, paid the $2,500.00 to Mr. Barrymore to do with as he saw fit. There were no restrictions upon the use to which the $2,500.00 was to be put by Barrymore or respondent, Mr. Woolley, as his attorney. The Bankruptcy Court refused to have Elaine Barrymore's property rights recognized in or become a part of the bankruptcy proceeding. The Referee in Bankruptcy, however, knew to what purpose the money was being put that was being paid to Barrymore and placed no restriction upon its use, that is, whether it was to be paid to Elaine Barrymore as a part of her property settlement, or to her attorneys for services, or both.)

On November 28, 1940, respondent, Mr. Woolley, prepared an order voluntarily reducing the weekly drawing account to Barrymore from $1,000.00 to $900.00 per week. The consent reads as follows:

"CONSENT TO REDUCTION OF WEEKLY ALLOWANCE AND ORDER THEREON

"To the Honorable Ernest R. Utley, Referee Herein, and to Samuel A. Miller, Receiver Herein:

"The undersigned, as attorneys of record for John Barrymore, Debtor in the above entitled proceedings, do hereby consent, without prejudice, to the making on an Order reducing the *weekly allowance or advance* to said John Barrymore as debtor herein, from the sum of $1000.00 heretofore allowed by the Order of June 5th, 1940, to the sum of $900.00 per week; this Order to remain in effect for such period of time as the weekly income from the earnings of said Debtor shall be insufficient to meet and pay the Orders of the Court heretofore made in this matter, but without prejudice to the reinstatement of the original Order of June 5th, 1940, and without prejudice to the repayment of said weekly deductions of $100.00 if, as and when the future earnings of said Debtor, John Barrymore, shall be sufficient to reinstate the original Order of June 5th, 1940, and make up the deductions herein provided for. This consent to be effective beginning with the weekly allowance for the week ending November 27th, 1940.

"Dated: November 28th, 1940.

"ROLAND RICH WOOLLEY &
HIRAM E. CASEY,
By JOSEPH F. RANK,
By HIRAM E. CASEY,
Attorneys for Debtor.

"It Is So Ordered.

"Dated: November 29th, 1940.

ERNEST R. UTLEY."

[Rec. pp. 144 and 145.]

The hearing before the Referee, December 12, 1940, also demonstrates that the Referee was solely determining the amount of money to be paid to Barrymore and the reasons for such determination. The following is a colloquy between the Referee and Mr. Durst, an attorney who was a creditor:

"Los Angeles, California. Thursday, December 12, 1940. 10:00 o'clock, A. M. Session.

* * * * * * * *

"Mr. Durst: Do I understand in the meantime Mr. Barrymore is still drawing a thousand dollars a week?

The Referee: He apparently reduced that to nine hundred.

Mr. Durst: I object to any further payments being made to Mr. Barrymore from this time on until he gets back to work. [30]

The Referee: Is he still earning a thousand dollars a week?

Mr. Woolley: Yes, he is still on the radio.

The Referee: I see no reason for changing the order. It will stand. (Referring to order of June 5, 1940.)

Mr. Durst: The court understands that takes another $3,000 out of this estate for the three or four weeks the Court is continuing it.

The Referee: Mr. Durst, when Mr. Barrymore was relieved of his contract and was only earning a thousand dollars a week I stated to some of counsel, I don't know who it was, that I would not permit him to draw more out of the estate than he was earning, and he apparently reduced it to nine hundred. He was earning a thousand dollars a week and that

was the basis for that. The Court was looking after that matter itself to see that he was not drawing out more than he was putting in. He voluntarily reduced it to nine hundred a week.

* * * * * * * *

Mr. Durst: Is it in the Court's order if he earns nothing he draws nothing? [31]

The Referee: When he stops earning the Court will look after that itself." [Rec. pp. 394, 398, 399.]

An original plan for an arrangement was filed on November 6th, 1940 [R. 119-125]; an amended plan on February 7th, 1941 [R. 146-163]; and a second amended plan on April 9th, 1941. [R. 170-185.] Under the first one, the proposal was to pay into court the sum of $25,000 in full satisfaction of the claims of unsecured creditors. However, under the amended plan, the proposal was entirely changed, and it was proposed that the earnings of Mr. Barrymore be turned over to the Receiver, and that he receive out of the fund the sum of $600 per week so long as his earnings equalled that sum, and that a reserve in the sum of $400 per week be created each calendar year as a reserve for any period of time during which he was not employed, at the end of which any surplus be turned over to the creditors. [R. 155-156.] It further provided that $100 per week be turned over to Mr. Barrymore as a general retainer for an attorney. An amendment to this proposal was filed March 18th, 1941, having the same provisions with respect to Barrymore, but limiting the reserve to $7500. [R. 164-167.] Under the second amended plan, it was proposed that he receive the sum of $700 per week, and that the reserve fund be $400 per week until $7500 was accumulated. [R. 180.] The plan

subsequently filed February 7, 1941, above mentioned, had been prepared and submitted by Mr. Barrymore to his creditors who had suggested various amendments, and that plan was under discussion at a hearing on January 31, 1941, which is typical:

"Los Angeles, California
Friday, January 31, 1941.
10:00 o'clock, A. M. Session.

* * * * * * * *

"The Referee: Generally, what is the proposed plan?

"Mr. Rank: Well, as amended, generally speaking, the plan is Mr. Barrymore is *going to voluntarily agree to accept $600 a week* for his personal expenses, with the provision that $400 a week will be put in a reserve so if *he is unemployed* at any time he can draw from the reserve, but at the end of each calendar year any money unexpended will be available for prorata distribution among crditors. (41)"

[Rec. pp. 406, 407, and 408.]

(Comment: It will be noted that Mr. Barrymore, under this plan, was to receive $1,000.00 per week, $600.00 to be paid without restriction as to its use and $400.00 to be put in a reserve to take care of Mr. Barrymore if he should be unemployed. The language used by Mr. Rank is significant:

"* * * the plan is Mr. Barrymore is going to *voluntarily agree to accept* $6.00 a week."

It shows clearly that the Referee and everyone else were fully aware that the earnings of Barrymore subsequent to June 5, 1940, when the petition for arrangement was originally filed, were not assets of creditors, and Bar-

rymore and the creditors were bargaining as to the amount that he was to be paid in consideration of turning in to the Receiver his earnings as an actor and radio performer. It applied to a plan which was to be effective only when approved by the Referee. This is clearly shown by the proceedings of January 31, 1941, of which the following is a part.)

> "Mr. Durst: I think the allowance should be cut down now. Three hundred should be set aside as the reserve and he be only paid six hundred a week now.
>
> "Mr. Rank: *We don't agree to that,* and there shows the lack of cooperativeness on Mr. Durst's part, to raise that question. We have been trying to get the plan through and we are not going to be committed to any such amount because we do not think that is a fair amount. Mr. Barrymore is only willing to do it because of the hope he has in working it out.
>
> * * * * * * * *
>
> "The Referee: Well, I think since it has gone this far it may as well stand for another three weeks as long as he is employed for enough to pay that and create a little surplus in the hands of the Receiver. It may as well remain as it is until February 21."
> [Rec. pp. 416, 417, 418.]

The statement of counsel was, in effect, notice to the Referee and the creditors that debtor's counsel were continuing to proceed upon the basis that any reduction in Mr. Barrymore's drawing account would require a sanction by him if the continued contribution of his earnings to the Receiver was expected.

The hearing before the Referee on March 18, 1941, [Rec. pp. 436 to 489, incl.] is the one upon which the

petitioner places great stress. This was the hearing where the plan of arrangement was under discussion. It was apparently favored by the taxing authorities but was opposed by certain creditors. The plan called for the unrestricted payment to Barrymore of $600.00 per week and the placing of $400.00 in reserve to take care of Barrymore while he was unemployed, and also to aid him in paying his current taxes. The Referee was skeptical of the success of the plan so far as it affected the general creditors. He pointed out clearly the effect of adjudication upon the earnings of Barrymore subsequent to June 5, 1940. The following statements of the Referee and others, are illuminating:

"Los Angeles, California
Tuesday, March 18, 1941
10:00 o'clock, A.M. Session.

* * * * * * * *

"The Referee: * * * Here is the situation, of course. I seriously doubt under this set-up that general creditors will ever get any money. The only thing you are accomplishing by this plan at all is the payment of the tax claims and the payment to Diana Barrymore and Mrs. Vruwink, and of course the State taxes. You are getting some of those items paid where probably otherwise they would not be paid. That is about all you are accomplishing in this plan. Mr. Barrymore is not getting any younger, his earning ability is gradually getting less and less. It is not increasing. Your tax situation is very, very liable to increase very substantially. I would not be at all surprised, if this plan is approved under the present set-up, you are going to find you are running delinquent on this payment of taxes within this year to both the Government and the State. (95)

"Now, on the other hand, what do you accomplish by a dismissal of the plan, or an adjudication? *If there is an adjudication creditors would not be entitled to any of the present earnings of the bankrupt, except, of course, the tax claimants.*

* * * * * * * *

"The Referee: Mr. Durst, mark my word if this plan is approved the only reason the Court is approving it is that at least the taxing agencies would get something that otherwise they would not get, and also perhaps the children. I don't think general creditors will ever got anything."
[Rec. pp. 436, 456, 457, and 460.]

(Comment: On March 18, 1941, at this same hearing for the first time the question was brought up respecting an accounting of moneys paid to Barrymore. As of March 19, 1941, respondent, Mr. Woolley, had been paid by Barrymore on account of services rendered Barrymore in the divorce proceeding the sum of $5,150.00 of the total of $5,950.00 involved in this present dispute.)

Mr. Durst, an attorney and creditor, first raised the question of an accounting. The portion of the transcript and the discussion respecting it is as follows:

"Mr. Durst: * * * I think there should be an accounting of all moneys paid to Mr. Barrymore. It is about $40,000 and I think the creditors are entitled to know where it went. I think the debtor's attorneys should be required to file an accounting for the expenditures of that money up to date."

* * * * * * * *

"Mr. Wix: (attorney for creditor) I have not agreed with many things in this proceeding, but I do agree with the thought that Mr. Barrymore should

make an accounting and there should be some finding here or some information before this Court indicating whether he needs $600 a week. I don't think he does. He doesn't pay anything for rent, and I don't think any person who has $110,000 of obligations outstanding has a right to be living on $600 a week, and I think that is the thing that is really wrong with the plan."
[Rec. pp. 461 and 462.]

(Comment: The Referee ignored the demand of the attorneys for creditors. He made no order or suggestion that respondent, Mr. Woolley, or his associate counsel, state what disposition Barrymore had made of the approximate $40,000 paid to him out of his earnings. Petioner cites on page 46 of his brief a statement made by the Referee subsequent to the approval of the plan and months after the substitution of Mr. Woolley wherein he states that he had requested or suggested an accounting. However, in this he is clearly in error, and the District Court so found. (Finding VIII, R. 350.) It will be noted that no citation to the record where such accounting was ever requested during the proceedings is made by petitioner, and this notwithstanding the petitioner has been repeatedly challenged to show that the Referee ever by a single, uttered word indicated that he wanted or felt he was entitled to an accounting of the money allowed to Mr. Barrymore. The record already quoted, clearly shows that the Referee knew that the money being paid to Mr. Barrymore was his money to do with as he saw fit. The attorneys making the demand for the accounting must have been of a like mind because never again was the question of an accounting raised.)

(As we have observed, the hearing on March 18th concerned the amended plan and a proposed amendment thereto upon the approval of which Mr. Barrymore was to receive $600 per week. Mr. Durst, one of the creditors, stated at the outset that he believed "the thing to do would be to proceed with the plan." [Rec. p. 436.] Mr. Wix had prepared an analysis which he contended showed that the proposed plan was unworkable, which the Referee stated he believed should then be considered. [Rec. p. 442.] The Referee objected to the provisions in the proposed plan that Mr. Barrymore receive $600 per week and $100 for his attorneys, and stated that he believed in these two items a substantial reduction could be made. [Rec. p. 457]; that if he was given $600 per week, he could pay his counsel out of that without additional expense. [Rec. p. 458.] Later in the discussion, Mr. Casey made the statement that "$600 is the least Mr. Barrymore can get along on by his own standard of living." The Referee then stated, "What *would* he spend $600 a week for?" It will be noted that he does not state, "What *has he been* spending $600 a week for?", but, "What *would he spend*" it for. It should also be noted that at that time *Mr. Barrymore was receiving not $600 a week, but $900 per week*, further showing that it is the future under the plan which is under discussion, and not the money that has been paid to Mr. Barrymore pending its approval. This is further clarified by Mr. Casey's statement, "If we were asking this money to be allowed out of present assets * * *." [Rec. pp. 466-467]; and again when Mr. Casey had mentioned his expenditures for help, the Referee states, "He does not pay them any *$600 per week*." [Rec. p. 467.] The record shows this again on page 468, when the Referee states, "What is he going to do with $100 a day?" When various expenditures are mentioned, *each is de-*

ducted from the $600, and not from the $900, the least amount from which the deduction would be made were they discussing his past expenditures. [Rec. p. 468.]

Petitioner emphasizes on page 40 of his brief a statement by Mr. Woolley, "You asked for it, Your Honor, and I am trying to give it to you." But a reading of simply the portion of the record quoted by petitioner on pages 33 to 35 of his brief, shows that Mr. Woolley's statement had reference to the Referee's statement, "What is he *going to do* with $100 per day?" (Petitioner's brief p. 34). Even in the discussion as to what he needed $600 a week for it is pointed out that the items mentioned do "not take into consideration any *extra expenses*." [Rec. p. 469.] That Mr. Barrymore desired $100 per week for his counsel was made clear by the very terms of the plan.

The foregoing probably suffices to show what was under discussion. If more is required, see the following: the statement of Mr. Woolley that it is Mr. Barrymore who is *going to lay* the golden egg [Rec. p. 469]; the statement of the Referee immediately following the discussion, that he is not going to approve a plan that is not workable [Rec. p. 470]; Mr. Woolley's statement that "This plan is the result of conferences" [Rec. p. 470]; and Mr. Durst's statement that "When we were in these conferences (discussing the plan) $600 per week was a compromise too." [Rec. p. 474.]

At the conclusion of the foregoing hearing, the court reduced the allowance to $600 per week with an extra $300 per week placed in reserve. [Rec. p. 485.]

At a hearing on April 21st, the court had before it the second amended plan, filed April 9, 1941. [Rec. p. 185.] At this hearing, Mr. Black, counsel for one of the Barry-

more children, maintained that the allowance under the plan was too high. Mr. Rank replied that he believed it was modest, inasmuch as Mr. Barrymore was a man who had to have certain money for upkeep and maintenance; that he had a large staff of servants and "has to have" a lot of *legal assistance* to work out his problems, bills and obligations [Rec. p. 496], and, further, that he did not believe the creditors should object to the proposed allowance of $700 per week, when they consider that it included his *expense for legal services* and medical attention, as well as other expenses that he would have to pay. [Rec. p. 497.] This statement not only had reference to the plan, but specifically mentions *legal services*.

Respondent, Mr. Woolley, and Mr. Casey, were substituted out as Mr. Barrymore's attorneys in May, 1941. Thereafter, on June 19, 1941, and when other attorneys represented Mr. Barrymore (the same attorneys who are now representing petitioner), the Referee made an order approving the plan of arrangement as follows:

"ORDER APPROVING PLAN OF ARRANGEMENT.

* * * * * * * *

"1. There shall first be paid to Samuel A. Miller as disbursing agent for the debtor, John Barrymore, out of said fund, the weekly sum of $700.00, providing, however, that the Court herein reserves the right to modify said weekly payments for reason deemed sufficient by the Court in its discretion.

* * * * * * * *

"3. There shall next be paid into a special reserve fund, to be maintained by said receiver, the sum of $400.00 per week (or such amount up to $400.00 per week as your debtor shall earn in excess of the amounts provided for under subdivisions 1 and 2

above), until the total amount in said special reserve fund shall equal $7500.00, and thereafter the payments into said fund shall continue only to the extent necessary to maintain said fund in said amount of $7500.00.

* * * * * * * *

"Dated this 19th day of June, 1941.

"ERNEST R. UTLEY

Referee in Bankruptcy (206)"

[Rec. pp. 221, 227, 228, and 232.]

(Comment: The hearing on March 18, 1941, clearly demonstrated that Mr. Barrymore could not use for just living expenses the sum of $600.00 per week. The respondent, Mr. Woolley, is severely criticized for inducing the Referee, as claimed by petitioner, to maintain the payments to Barrymore at first, $1,000.00 per week and then later at $900.00 per week, and yet in the final order approving the plan of arrangement when Barrymore was represented by counsel other than respondent, Mr. Woolley, and his associates, the Referee in Bankruptcy approves the above order giving Barrymore not $600.00 per week, but $700.00, to be used by him without restriction, and not $300.00 in reserve per week as formerly provided, but $400.00 per week. Furthermore, with the approval of the plan of arrangement, no suggestion was made by the Referee or by Mr. Barrymore or his then attorneys, or the creditors, that there be any accounting from Barrymore respecting the disposition of over $40,000.00 paid to him in approximately one year from the time of the filing of the petition for arrangement on June 5, 1940.)

United States District Judge Peirson M. Hall reviewed the entire record before the Referee and made his order reversing the order of the Referee in Bankruptcy by which the latter had ordered repaid into the Bankruptcy Court $5,950 by respondent, Mr. Woolley, being the sums Barrymore had paid to respondent out of his drawing account.

The pertinent part of the findings of the United States District Judge are as follows:

"III.

* * * * * * * *

"It is not true, as alleged in the Amended Petition of John Barrymore against Roland Rich Woolley herein, dated October 25, 1941, that said sums paid to John Barrymore under said orders were allotted only for his living expenses, or were allowances to him only for his living expenses. The payments made to said John Barrymore, and the orders for such payments did not in any wise limit or restrict the use thereof by him to his living expenses, or otherwise, or for any specific purpose.

"IV.

"Prior to September 20, 1940, John Barrymore became involved in matrimonial difficulties with his wife, Elaine Barrymore. On September 20, 1940, and prior to the time Mr. Woolley became one of the attorneys for Mr. Barrymore in the above entitled arrangement proceeding, John Barrymore entered into a written contract with Roland Rich Woolley, employing him to act as his counsel in connection with contemplated divorce proceedings and the adjustment and settlement of the property rights and interests of the Barrymores. By the terms of said contract, Mr. Barrymore agreed to pay to Mr. Woolley, as his

compensation for such legal services, the sum of $10.000.00, this sum to include all his services in the Superior Court of Los Angeles County, California. This written contract was entered into by John Barrymore freely and voluntarily, and said contract was never rescinded by said John Barrymore. The services agreed to be performed by Roland Rich Woolley thereunder were fully and completely performed by said Roland Rich Woolley. (308)

"V.

* * * * * * * *

"Said sums, and the whole thereof, were paid to Roland Rich Woolley by John Barrymore from personal earnings of John Barrymore, earned subsequent to the filing of his original petition for an arrangement herein, and from sums which were paid to John Barrymore pursuant to the provisions of the said order of June 5, 1940, as thereafter amended by the subsequent said orders of August 2, 1940, November 29, 1940, and March 19, 1941. Said sums received by Roland Rich Woolley, as aforesaid, were the sole and unrestricted property of John Barrymore, paid to him without restriction or limitation. The entire sum was paid to Roland Rich Woolley for legal services rendered in connection with the divorce proceedings between said John Barrymore and his then wife, and said sums were not paid for services rendered in any matter relating to or con- (309) nected with this bankruptcy proceeding.

"All of the aforementioned payments received by Roland Rich Woolley were received by him with the consent and approval and at the express direction of said John Barrymore.

* * * * * * * *

"VII.

"The divorce attorney fee agreement of September 20, 1940, was not submitted to or approved by the said Referee in Bankruptcy, nor was the said Referee in Bankruptcy informed of the terms thereof or of the payments made to Roland Rich Woolley thereunder, *but, in this connection, the Court finds that neither said agreement, nor the legal services to be performed thereunder, related to or concerned the above entitled arrangement proceeding, or the assets of John Barrymore possessed by him at the time of the filing of his original petition for an arrangement herein.* The Court further finds that the disclosure to the said Referee in Bankruptcy or to the creditors of the debtor's estate by Roland Rich Woolley, of the existence of said divorce attorney fee contract, or of its terms or provisions, or of the payments to Roland Rich Woolley thereunder out of the earnings of John Barrymore subsequent to June 5, 1940, was neither necessary nor required of him, and that it was not the duty of Roland Rich Woolley, nor was it incumbent upon him, to apprise the bankruptcy court or the (310) creditors of the debtor's estate of the contents of the said agreement, or the payments made to Roland Rich Woolley thereunder by John Barrymore.

"The Court further finds that the pendency of the said divorce proceedings between said John Barrymore and his wife were discussed in open court before the said Referee in Bankruptcy in the above entitled arrangement proceeding on October 9, 1940, November 6, 1940, November 7, 1940, November 26, 1940, March 18, 1941, and April 21, 1941, including the fact that extensive legal services were being performed by Roland Rich Woolley on behalf of John

Barrymore in connection therewith, as well as fact pertaining to the progress, development and termination of said domestic litigation. The said creditors and the said Referee in Bankruptcy knew at said times that the assets possessed by John Barrymore at the time of the filing of his original petition for arrangement herein were in the custody of the bankruptcy court; that all sums earned by him subsequent to June 5, 1940, had been voluntarily paid by or through John Barrymore to the said Receiver in Bankruptcy, and that the said sums received by said John Barrymore subsequent to June 5, 1940, as ordered paid to him by the said Referee in Bankruptcy, constituted the only funds from which payments could be made by him on account of services performed by his attorney in said domestic controversy and litigation.

"The Court further finds that the said Referee in Bankruptcy and the creditors knew as early as October 9, 1940, that an agreement existed between Roland Rich Woolley and the debtor for the debtor's legal representation by Roland Rich Woolley in the divorce matter, and knew or should have known, that said Roland Rich Woolley was being paid, or would be paid, compensation for said services from sums received by John Barrymore as an allowance herein.

"VIII.

"It is not true that the said orders of the said Referee in (311) Bankruptcy providing for a drawing account or allowance to debtor, were made by the court in this proceeding upon the representation by Roland Rich Woolley that the sums so allowed were necessary for debtor's maintenance. In this connection the Court finds that the order providing for the drawing account or allowance to John Barrymore

was made on June 5, 1940, and more than three months prior to the date said Roland Rich Woolley became one of John Barrymore's attorneys in the above entitled arrangement proceeding, and that the order so made on said June 5, 1940, continued in effect during the entire period that Roland Rich Woolley represented the debtor in this arrangement proceeding, except to the extent that it was voluntarily reduced $100.00 by John Barrymore on November 29, 1940, and to the extent that the said Referee in Bankruptcy restricted the use of $300.00 thereof by his order of March 19, 1941, hereinabove mentioned, and except for the period during which payments were withheld while the debtor was unemployed.

"The Court further finds that pursuant to said order of June 5, 1940, and as amended on August 2, 1940, for a drawing account or allowance, there was paid to John Barrymore by the said Receiver, from debtor's earnings for services rendered by the debtor subsequent to June 5, 1940, the sum of $42,500.00, covering the period from June 5, 1940, to May 7, 1941.

"The Court further finds that from June 5, 1940, up to May 17, 1941, the date when Roland Rich Woolley and Hiram E. Casey ceased to be the attorneys for John Barrymore in the above entitled proceeding, that neither the Referee in Bankruptcy nor the Receiver in Bankruptcy ever sought, requested or demanded an accounting of said money paid over to John Barrymore pursuant to said order of June 5, 1940, and as amended on August 2, 1940.

"The Court also finds that the drawing account or allowance of John Barrymore was not made or continued upon any representa- (312) tions by Roland Rich Woolley, but was made and predicated upon John Barrymore continuing voluntarily to pay into court all his personal earnings as an actor in excess of sums which he sought to withdraw, and upon such earnings so paid in being in excess of amounts paid to him pursuant to said orders for an allowance.

"It is not true that Roland Rich Woolley concealed from the said Referee in Bankruptcy the fact that the sum of $5950.00, or any sum, was paid to him as attorney's fees in the divorce matter. The Court finds that said Roland Rich Woolley did not state the amount of his divorce fee to the Referee for the reason that he properly believed that John Barrymore was entitled to use his drawing account or allowance for such purposes as he saw fit, including the payment of attorney's fees for any legal services of any type rendered outside of the bankruptcy proceeding, and that the Referee knew that said Roland Rich Woolley was receiving compensation for his legal services in said divorce action, and that the Referee was not concerned with, or interested in the amount or payment thereof, providing it was paid from the said allowance or drawing account."

[Rec. pp. 344, 345, 346, 347, 348, 349, 350, and 351.]

The Circuit Court of Appeals, with the full record before it, affirmed the judgment of the District Court.

(Comment: There is no conflict in the evidence. The United States District Judge and the Circuit Court of Appeals refused to accept the unwarranted conclusions made by the Referee from the evidence before him.)

The foregoing facts clearly demonstrate that:

1. The monies paid to Barrymore were paid out of his future earnings acquired subsequent to June 5, 1940.

2. The weekly drawing account paid to Barrymore was agreed to and fixed months before Mr. Woolley ever represented Mr. Barrymore in any capacity.

3. The "drawing account" paid to Barrymore was not for his use solely as living and household expenses but was a "drawing account" to be used by him as he pleased and without restriction or control of the Referee or the creditors respecting payments ordered and paid.

4. Barrymore had a right to employ counsel to represent him in his divorce action and settlement with his wife. The Bankruptcy Court refused to take cognizance of the divorce proceedings. The divorce case was separate and removed from the bankruptcy proceeding. Barrymore had a right to contract with respondent, Mr. Woolley, to represent him therein. Respondent, Woolley, could not claim fees in the Bankruptcy Court for services rendered in the divorce action.

ARGUMENT.

No Grounds Are Shown for the Granting by This Court of a Writ of Certiorari.

(a) No Important Question of the Federal Bankruptcy Law Undecided by This Court Is involved.

Petitioner refers to Rule 38-5, Subdivision (b) as a basis for his petition, but fails to show grounds for the exercise of the discretion of this court for the granting of a writ of *certiorari*. The contention that the Circuit Court has determined matters in connection with the effect of a subsequent adjudication of a debtor who has filed a petition under Chapter XI is based upon a misapprehension of the decision of the Circuit Court. The determination of the ownership of funds remaining in the hands of a receiver pursuant to a debtor's plan of arrangement and undistributed to creditors, which petitioner states is involved in this case, is in no wise involved therein. *The facts outlined above show that the case does not involve any money paid over by a debtor to comply with the terms of a plan, or the ownership of such funds upon a subsequent adjudication.* The court does not and could not in this action determine who would be entitled to such funds. Petitioner is mistaken when he states, "In this matter the effect is that the funds remaining in the hands of the receiver, proceeds of the earnings of the debtor paid into court in accordance with the debtor's plan of arrangement and undistributed to creditors, become the property of the debtor's probate estate." (Petitioner's Brief, p. 14.) The statement of the Circuit Court upon which petitioner relies (See p. 13 of his brief) is prefaced with the statement showing that it has reference to money paid to the respondent. As shown in the statement of facts, *all money* paid to respondent was paid from earnings of the debtor

after the filing of his petition and *before* the approval of any plan. They were not funds in the hands of a receiver for distribution under a plan approved by creditor, nor were they any part of the funds which the debtor agreed should be distributed under the provisions of the plan approved by the court. Therefore, it is apparent that, assuming petitioner is right in his contention that money which is in the hands of a distributing agent under an approved plan at the time of an adjudication belongs to the creditors and not to the debtor, the statement of the court is nevertheless correct that the *money here involved* belonged to the debtor.

This being a proceeding under Chapter XI of the Bankruptcy Act, no jurisdiction over future earnings of a debtor exists. While such jurisdiction is given under Chapter XIII, proceedings under that Chapter are limited to wages earned that were not to exceed $3600 a year. (B. A. Sec. 606, Subd. 8.) Chapter XI contains no similar provision. Consequently, as observed by the Circuit Court in its opinion, any existing jurisdiction would have to depend upon the arrangement proposed by the debtor. (See Opinion, Brief of Petitioner, p. 59.)

While earnings of the debtor were voluntarily paid over to the receiver in the interim between the filing of his petition and the acceptance of the plan, in anticipation of the acceptance of some plan by the creditors, notwithstanding that no procedure requires or authorizes such action, the plan offered and accepted by the creditors provided, as stated in the opinion of the Circuit Court, that "'all earnings of the debtor—*earned and payable after the adoption and approval of this plan*'—should be paid to the custodian or disbursing agent." (Opinion, Petitioner's Brief, p. 63.) The court then points out, "It will be

observed that there was no agreement or obligation upon the part of the bankrupt to pay any money upon his proposed plan of arrangement until the confirmation of his plan of arrangement on June 19, 1941." (Opinion, Petitioner's Brief, p. 65.) Therefore, contrary to the contention of the petitioner that the decision of the court affects "funds remaining in the hands of a receiver—paid into court in accordance with the debtor's plan," no such funds are the subject of the court's decision. Actually, the plan for an arrangement had failed and the debtor had been adjudged a bankrupt when the Referee sought to compel respondent to pay the money here involved to the trustee. That money consisted of earnings of the debtor subsequent to the filing of his petition and prior to the adoption of a plan and not payable to creditors under the plan which had failed.

The effect of petitioner's contention, that the funds involved in this case could be ordered paid over to the receiver and held for creditors, would be that they would receive not only what they agreed to accept under the approved plan, but, in addition, take from the debtor after acquired earnings which were neither a part of his bankrupt estate nor a part of earnings which he agreed to pay to them under any plan approved by them or by the court.

Obviously, the statement of the court of which petitioner complains, that the money paid to respondent was debtor's own money to do with as he saw fit, is correct whether petitioner is right or wrong in his contention that money in the hands of a disbursing agent under an approved plan belongs to the creditors in the event the plan fails. That is a question which can be determined when it arises in a proceeding where it is involved.

(b) The Decision of the Circuit Court Is Not in Conflict With Decisions of Other Circuits.

The date of filing of the original petition by the debtor under Chapter XI for an arrangement with his creditors furnishes the line of cleavage just as the filing of an ordinary petition in bankruptcy and an adjudication thereon. (B. A. Sec. 312, Subd. 3; 341, 352.) Earnings of the debtor from personal services after an adjudication are not part of the bankrupt's estate and the bankruptcy court acquires no jurisdiction over them. (*Local Loan Co. v. Hunt*, 292 U. S. 234, 78 L. Ed. 1230, 24 A.B.R. (N.S.) 668; *In re Liebowitt* (C.C.A.2), 93 F. (2d) 333, 35 A.B.R. (N.S.) 446; *Seaboard Small Loan Corp. v. Ottinger* (C.C.A.4), 50 F. (2d) 856, 18 A.B.R. (N.S.) 500; *Brouwer v. Superior Court*, 130 Cal. App. 163.) There is no provision in the law for the deposit of future earnings with the bankruptcy court, and the bankruptcy court could have no jurisdiction over funds deposited by Mr. Barrymore. Clearly, when Mr. Barrymore filed his petition and as a concommitant part thereof voluntarily paid to a receiver his earnings and was granted a drawing account of $1,000 a week, it amounted to Mr. Barrymore paying in his future earnings only upon condition he receive the $1,000 per week ordered by the court. As indicated by the Circuit Court, to all practical purposes, he reserved $1,000 a week and paid the balance to the receiver. Jurisdiction, if any existed, depended entirely upon the voluntary concession and acquiescence of Mr. Barrymore and only to the extent of that acquiescence. To hold that the court had jurisdiction over future earnings of a debtor subsequent to the filing of his petition would offend the spirit and purpose of the bankruptcy act to the undesirable oppression of debtors, a situation against which the courts in the cases above cited were careful to

guard. In *McKeever v. Local Finance Co.* (C.C.A. 5) 80 F. (2d) 449, a proceeding involving jurisdiction over earnings where an arrangement had been approved, it was held that future earnings of a debtor are not property over which the court had jurisdiction, and that the extension agreement was merely a device or plan by which, so long as the debtor was willing to carry it out, part of his earnings could be paid over and made available for the discharge of his debts.

Petitioner contends that in holding that the bankruptcy court did not have jurisdiction to require respondent (who had been the recipient of certain of his future earnings) to pay such funds over to the court for the benefit of debtor's creditors, the decision of the Circuit Court of Appeals is in conflict with *Hotel Governor Clinton v. Knott,* (C.C.A. 2), 120 F. (2d) 149. However, the facts of the two cases are fundamentally and entirely different, and because of that, the case is not in point.

It is clearly distinguishable from the case at bar on the following grounds:

1. The *Governor Clinton* case was at all times only concerned with income from the property of the debtor *owned by it at the time of the filing of the petition in bankruptcy,* while here we are dealing with the debtor's personal earnings from personal services, earned *after the commencement of bankruptcy.* This is a vital distinction, as appears from the authorities we cited relative to the principle that the date of the filing of the bankruptcy petition furnishes a line of cleavage between the "old" and the "new" order.

2. In the *Governor Clinton* case, the debtor was a "debtor in possession," with the same fiduciary duties as

those of a receiver or a trustee in bankruptcy (B. A., Sec. 188; *Urban Properties Corp. v. Benson*, C. C. A. 9, 45 A. B. R. (N. S.) 51, 116 F. (2d) 34), while here we are dealing only with a simple debtor for whose estate a receiver had been appointed. Mr. Barrymore did not have any fiduciary obligations to the estate, and his attorney was in a similar position. When Mr. Woolley became one of the debtor's attorneys in the debtor proceeding, the only fiduciary relation he assumed was one with the debtor personally. His job was to assist the debtor to perform his duties under the Bankruptcy Act and to secure, if possible, a suitable arrangement with his creditors. Mr. Wooley as attorney for Mr. Barrymore in the divorce proceedings had no duty, fiduciary or otherwise, to the bankruptcy court beyond the usual duties of an attorney as an officer of the court. The debtor was an independent agent and did not have the duties and obligations of a debtor in possession whose position is analogous to that of a receiver or a trustee in bankruptcy. *(In re Urban Properties Corp., supra.)*

3. In the *Governor Clinton* case, the court made an order for compensation to the operating company to be paid out of debtor's assets, without knowing that the operating company and the officers of the court had a secret agreement for the division of the operating fee. If the court in the *Governor Clinton* case had known of the existence of this secret agreement, a different order would have been made allowing a smaller compensation to the operating company.

In the case at bar, none of these facts existed. The order allowing Mr. Barrymore $1,000 per week *drawing account* was made months *before Mr. Woolley came into the case* and months before the divorce complaint was

filed or the contract for the divorce fee was entered into, and the payment of it was not made from the assets turned over upon the filing of the petition.

The other cases cited by petitioner fall into the same category as the Hotel Governor Clinton case. They all involve property of the bankrupt estate.

Petitioner cites the case of *In re Breinig*, 40 F. Supp. 29, in support of his contention that the court had jurisdiction over the future earnings reserved by the debtor, and also over the fees for services rendered to Mr. Barrymore in the divorce suit. This District Court decision supports neither claim. That case involved jurisdiction over property of the bankrupt owned by him when the petition was filed and also involved a debtor in possession. The services of the attorneys in that case were performed in the bankruptcy court.

(c) The Opinion of the Circuit Court of Appeals Does Not Go Into the Question of Whether the District Court Is or Is Not Bound by the Findings of the Referee and Hence the Argument in That Connection Cannot Possibly Furnish Grounds for the Granting of a Writ of Certiorari Herein.

It is, of course, elementary that the sufficiency of evidence to support findings will not constitute grounds for the granting of a writ of *certiorari*. The question of whether or not a district judge is or is not bound by the findings of the referee is not determined by the Circuit Court and, hence, the Circuit Court has not decided a federal question not theretofore determined nor decided one contrary to other decisions.

However, considering briefly the contention of the petitioner that, because a referee is in a better position to judge the credibility of witnesses, the findings of the ref-

eree are conclusive, it must be borne in mind that all of the evidence in this case, with the exception of certain oral testimony, which had no pertinency to the allegations of the petition, *consisted of typewritten transcripts of all hearings before the referee while Mr. Woolley was attorney for the debtor.* Thus, except as to the latter matter, there can be no disagreement as to exactly what transpired. As a result, we need not be concerned in this proceeding with the question whether the district judge is bound by the findings of a referee made on a controverted question of fact. Where no question of credibiilty of witnesses is involved and the matter is heard upon a typewritten transcript, it seems apparent that the rule set forth in *Carr v. Southern Pacific Company,* (C. A. A. 9) 128 F. (2d) 764, is applicable. In that case the Circuit Court stated as follows:

> "It should be noted that the appellant claims that the findings of the referee were made on a controverted question of fact, and hence, cannot be disturbed. This is not the fact or the law. The statement in our decision *In re Eastern Oil Co.* (C. C. A., 9th Cir.), 38 Am. B. R. (N. S.) 607, 608, 100 F. (2d) 341, 342, that 'It is conceded by all parties * * * that "the findings of the referee upon controverted facts will not be disturbed",' is relied upon to support this claim. This court cited our decision in *Weisstein Bros. & Survol v. Laugharn* (C. C. A. 9th Cir.), 38 Am. B. R. (N. S.) 540, 80 F. (2d) 419, where the rule with reference to the power of the court is more fully stated. It was unnecessary in the Eastern Oil Company case to discuss or consider the matter, in view of the concurrence of the parties in the rule as stated. However, the rule relied upon has no application for in the case at bar no question of credibility of witnesses appearing before the ref-

eree is involved. *On the contrary, the parties agree as to exactly what occurred and what was said, differing only as to the effect of the language used.* The district judge and the judges of this court are in as good a position to interpret such language as was the referee. *Stewart v. Geney* (C. C. A., 5th Cir.), 44 Am. B. R. (N. S.) 199, 116 F. (2d) 1010, 1012."

As stated by petitioner after the matter was submitted, it was reopened at the request of the receiver at which time there was testimony concerning bills of the debtor alleged not to have been paid by Mr. Woolley from funds he was handling for the debtor. The debtor's former attorneys, Scott and Risse, had maintained the practice of depositing Barrymore's drawing account funds in a trust account and paying his bills from that account. Mr. Barrymore suggested that Mr. Woolley follow the same procedure, and the balance of the Scott-Risse trust account was turned over to Mr. Barrymore and then to Mr. Woolley. The referee found that two bills, known as the Kersten and Durando bills, were not paid by Mr. Woolley. He did not find, as would be inferred from petitioner's brief, that Barrymore's bills remained unpaid. The District Court found that Mr. Woolley paid all bills from the trust account which Mr. Barrymore directed or authorized be paid, without delay and made no payment except upon the direct authorization of Mr. Barrymore. [Finding X, Rec. p. 352.]

A most cursory examination of the pleadings will show that payment or non-payment of the bills of debtor by Mr. Woolley was in no wise an issue in the proceeding.

In the amended petition on which the matter proceeded, it is alleged that respondent caused Mr. Barrymore to pay him out of funds which he had earned since the debtor proceedings, $5,950 in the divorce matter, together with certain other fees; that a contract had been entered into between respondent and Mr. Barrymore for the payment of $10,000 for services in the divorce matter; that this contract had not been approved by the court, and that the court had no knowledge thereof; that the court was not informed of the fact that payments were made to respondent from the drawing account, and that the allowances to Mr. Barrymore had been made upon the representation that the amounts allowed were necessary for petitioner's maintenance. In the prayer it was requested that the amounts so received be repaid to the Receiver. [Rec. pp. 28-9.] Thus, it will be seen that no issue was raised as to the payment or non-payment of the bills. That the Referee's findings in respect to these bills was beyond the issues, is demonstrated also by a perusal of the conclusions of law and order of the Referee. [Rec. pp. 110-112.] In neither is there any further reference to the Finding XIII in respect to the bills, nor is the order in anywise predicated thereon.

The pertinent evidence having been submitted upon typewritten transcripts, the rule of the Carr case, *supra*, is clearly applicable and neither the district judge nor the judges of the Circuit Court were bound to determine the case in accordance with the findings of the Referee.

(d) The Contract Between the Debtor and Mr. Woolley Did Not Require the Approval of the Referee.

Petitioner herein contends that the contract between Mr. Woolley and the debtor for services to be rendered by Mr. Woolley to the debtor in connection with the divorce proceedings was a void contract and that in order for it to be of binding effect it had to have the approval of the referee in bankruptcy.

We do not question the decisions in the cases cited by counsel on pages 51 to 56 of his brief. It is unquestionably the law that, as held in those cases, a debtor is without authority to contract concerning property becoming a part of the bankrupt's estate upon the filing of his petition. It is no doubt further true that, as therein held, the bankruptcy court has exclusive jurisdiction over such property. However, there is no connection between such points of law and this case. Petitioner does not intimate that the debtor was a bankrupt in possession nor that any part of the money paid over by Mr. Barrymore to respondent was property of the debtor at the time of the filing of his petition. No cases of which counsel have knowledge, nor any cited by petitioner, hold that the bankruptcy court has jurisdiction over the property of the debtor earned and acquired by him subsequent to the filing of his petition, nor that it can control the bankrupt's contracts unrelated to previously owned property and require its authorization before they are entered into. Section 312 of the Bankruptcy Act provides that the jurisdiction and powers of the court in proceedings under Chapter XI shall be the same as in the case of an involuntary petition

for adjudication, and it has never been questioned to our knowledge but that after the filing of his petition, a debtor is free to contract concerning after acquired property in such manner as he may see fit. Such authority is not taken from him by Section 311 cited by petitioner. It is clearly stated in that section that the court shall have exclusive jurisdiction of the debtor and his property "for the purposes of this chapter." Contentions of counsel for petitioner seem to arise from a curious conception of Chapter XI proceedings in that he seems to assume that a debtor filing a petition under Chapter XI becomes, in effect, the slave of the creditors whose subsequent control over him and his future earnings through the bankruptcy court is absolute. Luckily, and properly so, no such jurisdiction is provided by the terms of the Act.

Conclusion.

It is respectfully submitted that no grounds for the granting of a writ of certiorari herein have been shown by the petitioner.

Respectfully submitted,

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JOSEPH F. RANK
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Attorneys for Respondent,

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TRANSCRIPT OF RECORD
IN THREE VOLUMES

Supreme Court of the United States

October Term, 1943

No. 146

SAMUEL A. MILLER, as Trustee in Bankruptcy of the estate of John Barrymore, Bankrupt,
Petitioner,

vs.

ROLAND RICH WOOLLEY,
Respondent.

VOLUME III

Pages 797 to 815

UPON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Rotary Colorprint, 590 Folsom St., San Francisco

No. 10460

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SAMUEL A. MILLER, as Trustee in Bankruptcy of the estate of John Barrymore, Bankrupt,

Appellant,

vs.

ROLAND RICH WOOLLEY,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

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PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday, February 11, 1944.

Before: Wilbur, Matthews and Stephens, Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Bertram H. Ross, counsel for appellant, and by Mr. Frank P. Doherty, counsel for appellee, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, March 20, 1944.

Before: Wilbur, Mathews and Stephens, Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE

By direction of the Court, Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Upon appeal from the District Court of the United States for the Southern District of California, Central Division.

OPINION

Before: Wilbur, Mathews and Stephens, Circuit Judges.

Wilbur, Circuit Judge:

This is an appeal from an order of the United States District Court reversing an order of the referee in bankruptcy which required the appellee to pay to the trustee in bankruptcy the sum of $5,950[1] which had been paid to appellee by John Barrymore as a part of the fee in a divorce case instituted by John Barrymore while a proceeding for an arrangement between Barrymore and his creditors, under chapter 11 of the Bankruptcy Act, was in progress. Concurrently with the filing of his petition for arrangement, under 11 U.S.C.A. § 722, on June 5, 1940, the debtor, John Barrymore, filed a petition stating that he was earning $5,000 per week in his profession as an actor; that it had been his practice to expend approximately $1,000 per week for his "household and necessary expenses" and asked the court to "fix his drawing account from his earnings" and alleged that a reasonable drawing account pending a further order of court "as and

[1]The appellee has $619.65 additional in his hands which he consented to turn over to the trustee, and it was so ordered.

for his living expenses herein and for his services herein should be and is the sum of $1,000 per week." The petition prayed that an order be made "fixing his drawing account for his household expenses and necessities at the sum of $1,000 per week, subject to the further order of this court." The order of the referee made on the same date ordered "that the drawing account of said debtor be and the same is hereby fixed in the sum of $1,000 per week, subject to the further order of this court."

During the pendency of the proceedings there were numerous meetings of the creditors before the referee. During these proceedings the disposition of the $1,000 per week paid the debtor was discussed.

On September 20, 1940 the debtor entered into a written contract wherein he agreed to pay to appellee Roland Rich Woolley the sum of $10,000 as a fee in a divorce suit to be instituted on his behalf by Mr. Woolley. On September 30th appellee Woolley and Hiram E. Casey were substituted as attorneys for the debtor in the arrangement proceeding. It should be observed that at the time the allowance of $1,000 per week was made by the court and at the time the contract for employment of appellee as an attorney in the divorce action was made the debtor was represented in the arrangement proceedings by other lawyers. So far as the representations are concerned which were made by the debtor to the referee in procuring the allowance in June 1940, the appellee Woolley had no connection therewith nor responsibility therefor. Under the agreement made by Mr. Woolley with the debtor the allowance

of $1,000 per week repaid to the debtor by the receiver in the arrangement proceedings was turned over to appellee Woolley when received and disbursed by him on behalf of the debtor to pay expenses, each disbursement being approved by the debtor. Appellee had retained on account of his services to the debtor in the divorce case the sum of $5,950. The retention of these amounts was approved by the debtor.

The theory upon which the referee ordered appellee Woolley to pay over to the trustee in bankruptcy[2] the sum of $5,950 was that the weekly allowance to the debtor would not have been continued at so high a figure if the appellee had not concealed the fact that he was being paid attorney fees from the allowance. The trial court, upon review, considered and held that the money paid to the debtor as an allowance belonged to him and that the debtor's estate in the arrangement proceedings had no concern with the disposition the debtor made of the allowance.

Before proceeding further it should be stated that the law concerning arrangements (ch.11 Bankruptcy Act) makes no provision for the payment of moneys to a debtor by way of allowances for living expenses. The power of the bankruptcy court in arrangement proceedings over the future earnings of the debtor is entirely dependent upon the

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[2]The debtor was declared a bankrupt after his death because the cessation of his earnings made it impossible to carry out the arrangement. 11 U.S.C.A. § 777.

arrangement proposed by the debtor in his petition for confirmation of the arrangement. The basic question then is, what was the arrangement proposed by the debtor and to what extent did the debtor yield jurisdiction over his future earnings. To determine this matter will involve some consideration of the proceedings before the bankruptcy court which we will state as briefly as may be.

The debtor owed the United States government $25,000 income tax for his fiscal year 1938, together with interest and penalties due to the default in payment. He owed over $5,000 for income taxes to the state of California. He owed large amounts of delinquent taxes to the county of Los Angeles. He also owed some preferred debts to laborers and others to general creditors. His assets were heavily encumbered with little prospect of any recovery therefrom for the benefit of general creditors. The only substantial source for payment of these obligations was money derived by the debtor from his current earnings which he estimated in his petition to be over $250,000 per annum. These earnings, as soon as realized, were subject to the lien of the United States government for the income taxes of 1938, amounting to about $30,000, and also gave rise to additional income taxes for the current year of 1940 for about the same amount as estimated,[3] and to California state income taxes, amounting to about one-fifth of the federal income taxes.

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[3]The 1939 income taxes had been paid before debtor's petition was filed in the arrangement proceedings.

In his petition for the arrangement the debtor enumerated his property and his obligations and offered an arrangement to pay into court each week the sum of $1500 to be devoted to the payment of his general creditors, such payments to be continued until the creditors were paid in full. He also offered to pay all outstanding taxes. The claims for these taxes were preferred claims and were secured by tax liens upon all the property of the debtor. The debtor did not state how nor in what manner he would pay these taxes, but it is fairly to be inferred from his attitude at the time he secured his allowance of $1,000 per week from the court that he intended to pay into the court all his earnings, alleged to be $5,000 per week, and to have returned to him the sum of $1,000 per week. It is reasonable to say that his proposal as made in his petition for the arrangement contemplated the payment to the receiver of his estate of all his wages on condition that he be repaid the sum of $1,000 per week.

As to the amounts which were to be paid for taxes, the federal and state governments were interested in the proceedings although the court had no authority over these preferred claims except to see that their priorities were preserved.[4] The general

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[4] 11 USCA § 707. Creditors; debts; claims. Unless inconsistent with the context and for the purposes of an arrangement providing for an extension of time for payment of debts in full and applicable exclusively to the debts to be extended—

(1) "creditors" shall include the holders of all unsecured debts, demands, or claims of whatever character against a debtor, whether or not provable

creditors were interested in the discharge of these overriding liens. The unsecured claims had no right to payment from current or future earnings of the debtor.[5] It is fair to say that the arrange-

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as debts under section 103 of this title and whether liquidated or unliquidated, fixed or contingent; and

(2) "debts" or "claims" shall include all unsecured debts, demands, or claims of whatever character against a debtor, whether or not provable as debts under section 103 of this title and whether liquidated or unliquidated, fixed or contingent.

11 USCA § 756. Modification of rights of unsecured creditors. An arrangement within the meaning of this chapter shall include provisions modifying or altering the rights of unsecured creditors generally or of some class of them, upon any terms or for any consideration.

11 USCA § 771. Discharge of unsecured debts upon confirmation. The confirmation of an arrangement shall discharge a debtor from all his unsecured debts and liabilities provided for by the arrangement, except as provided in the arrangement or the order confirming the arrangement, including the claims specified in section 754 of this title, but excluding such debts as, under section 35 of this title, are not dischargeable.

[5]11 USCA § 752. Rights, duties and liabilities of creditors, etc. Where not inconsistent with the provisions of this chapter, the rights, duties and liabilities of creditors and of all other persons with respect to the property of the debtor shall be the same, * * * where a petition is filed under section 722 of this title, as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed.

In re Leibowitt, 93 F.2d 333, 335. Wages of a bankrupt after adjudication are not subject to claims of the estate.

ment tendered by the debtor, as qualified by the accompanying petition for an allowance of $1,000 per week from his future earnings was one in effect to pay over to the receiver all his earnings except $1,000 per week, although his proposed "arrangement" was to pay only $1,500 per week, from which he requested his allowance of $1,000 per week. To state it somewhat differently, it was a proposal to retain $1,000 per week and to pay $500 per week to the receiver for the general creditors, and the balance of the debtor's earnings to go to pay his obligations to the state and federal governments and other secured or preferred claims.

No creditor questioned the right of the debtor to retain the moneys paid to him weekly by way of an allowance, but during the progress of the proceedings it was suggested by some of the creditors to the referee and also by the referee that perhaps this amount was too large, and inquiries were made as to the disposition and need of it, but these inquiries were directed largely to the question of the acceptance by the creditors of the proposed arrangement and the three amendments to the arrangement originally proposed. During this period negotiations were carried on in open court between the creditors and the debtor's attorneys and the United States government concerning the acceptance of the proposed arrangements as modified from time to time by the debtor to meet the objections of the creditors. It was not until June 19, 1941, slightly more than a year after the original petition was filed and after the debtor had paid the receiver over $100,000 from

his earnings in anticipation of the acceptance of his plan or arrangement by his creditors and confirmation by the court, that the third amended proposed arrangement was consented to and confirmed by the court. No accounting was made or required by the court as to the sum returned to the debtor by the receiver under order of court; the confirmation dealt only with the money in the hands of the receiver and with the debtor's future earnings.

The first amended proposed arrangement, filed February 7, 1941, provided that "all earnings of the debtor * * * earned and payable after the adoption and approval of this plan" subject to certain deductions specified should be paid to the custodian or disbursing agent. It was proposed by the debtor that from his earnings a weekly sum of $600 be paid to the debtor and that an additional sum of $400 per week be placed in a reserve fund to be paid to the debtor if and when his earnings were insufficient to pay him the $600 per week. It was stated: "It is the intention and purpose to provide petitioner with $600.00 per week for his personal living expenses so long as he may either earn said amount or there shall be in said special reserve fund an amount sufficient to permit the payment of the said $600.00 per week to your petitioner."

On March 18, 1941, an amendment to the amended proposition of the debtor was filed. This also provided for the payment of $600 per week to the debtor, $200 per week to his children, and $400 per week to be paid into the reserve fund. Payments

in the reserve fund were to continue until the amount in the reserve was equal to $7500. Subsequent payments were to be limited to the amounts necessary to continue the reserve at $7500. The amendment to the first amended proposition for the arrangement made March 18, 1941 eliminated the provisions with reference to "his personal living expenses" and provided directly for the payment of $600 per week to the debtor and $400 per week in the reserve fund without any statement that the weekly payments were for living expenses. The next day, March 19, 1941, the referee made an order directing that $600 per week be paid to the debtor in place of any amount theretofore paid to him on account of his personal expenses. Three hundred dollars per week was ordered paid into a special fund "to be earmarked as a reserve account to be used for such purposes as the court may hereinafter direct by a further order."

The second amended proposition, filed April 9, 1941, provided for the payment to the debtor of the sum of $700 per week, $200 a week additional to support debtor's children, and $400 per week to be paid into the reserve fund. Nothing is said as to the purpose for which this money is to be paid to the debtor except that in the proposed amended arrangement it is stated that "heretofore the referee herein fixed the sum of $1,000.00 per week as a reasonable amount for the support and maintenance of petitioner;" that the amount had thereafter been reduced to $900, and later to $600, plus a reserve of $300 per week.

In the meantime the receiver filed reports and accounts showing that he had received altogether from the earnings of the debtor during the pendency of the proposed arrangement $106,536.18, and that he had disbursed $72,254.97, leaving the balance on hand, $34,281.21. On May 17, 1941 an order was made substituting other attorneys for the debtor in the place of the appellee and Hiram Casey.

On June 19, 1941 an order was made approving, with modifications, the plan of arrangement as embodied in the second amended proposition, and providing that all future earnings of the debtor should be paid into a general fund and disposed of in accordance with the provisions of the order of confirmation and providing for the payment to the debtor of the sum of $700 per week, the court reserving the right to modify the weekly payment for any reason. It provided for the payment of $200 a week for the maintenance of the debtor's children, for the payment of $400 per week into the reserve fund to be applied on the weekly payments to the debtor and his children or otherwise as the court might direct.

It will be observed that there was no agreement or obligation upon the part of the bankrupt to pay any money upon his proposed plan of arrangement until the confirmation of his plan of arrangement on June 19, 1941.

The earnings of the debtor, whether deposited with the court or retained by him, were subject to the tax lien of the federal government, aggregating over $25,000. All the moneys paid out by the referee from the funds were subject to the lien of

the federal government in the hands of the payees or transferees if they took with actual or constructive knowledge of the lien. (26 USCA §§ 3670, 3672; see Investment and Securities Co. v. United States, decided by this court February 16, 1944.)

It was not until the federal government had received payments from the accumulated earnings of the debtor in full satisfaction of its claims that the moneys paid to the appellee and to others were finally relieved of the tax lien for the taxes of 1938.

Another factor to be considered is that the debtor died on May 29, 1942, before the arrangement confirmed on June 19, 1941 had been fully carried out; that on July 1, 1942 the deceased debtor was declared a bankrupt as permitted by 11 USCA § 26. We need not discuss the effect of this adjudication of bankruptcy, which is not discussed in the briefs, further than to state that the bankruptcy adjudication by the terms of the statute related back to the filing of the original petition for the arrangement on June 5, 1940, and, consequently, the earnings of the debtor thereafter, that is, from June 5, 1940 to July 1, 1942, under bankruptcy proceedings belong to him subject only to liens for taxes and to the rights of attachment or garnishment by those having claims which cannot be discharged in bankruptcy. The order of the referee requiring the appellee to pay $5,950 to the trustee in bankruptcy was made on September 25, 1942, nearly three months after the status of the bankrupt and the creditors had been changed by the adjudication in bankruptcy.

The proceedings which resulted in the order appealed from were initiated by the debtor on October 3, 1941. In this petition he alleged that he had agreed to pay the appellee $10,000 for his services as attorney at law in the divorce case which he was to institute for the debtor and that the fee of $10,000 was to cover the petitioner's services in the arrangement proceedings in the bankruptcy court as well as in the divorce proceeding to be instituted and that the appellee had paid himself from the funds of the debtor without the approval or knowledge of the court. The debtor asked that the fee be reduced proportionately and the balance be returned to the petitioner or the receiver.

This petition was answered by appellee on October 17th. The appellee set out the written agreement between the parties which showed the fee did not include services in the arrangement proceedings. On October 27, 1941 the debtor amended his petition alleging that the contract with appellee for his services in the divorce matter was not approved by the court and that the court was not informed of the fact that moneys paid to the debtor "for his living expenses" were being applied to the payment of said attorney's fees. The appellant alleged that the various allowances made to him for his living expenses were made by the court upon the representation by appellee that the sums so allowed were necessary for petitioner's maintenance and that the fact that during said period of time appellee paid to himself out of said funds the sum of $6,900 was concealed from the court. The prayer was that the

money be repaid to the receiver in the arrangement proceedings.

The received, after asking for instructions, intervened in the proceeding instituted by the debtor and the debtor's newly substituted attorneys notified the referee that in their opinion the fund of $5,950 should be ordered returned to the estate on the ground that the debtor's contract for the payment of the fees to the appellee was void because not approved by the court and that in maintaining the high allowance granted to the debtor the court was not advised that part of the funds were being used to pay the attorney's fees of appellee.

The question as to whether or not a $10,000 fee in the divorce matter was exorbitant or whether the agreement therefor was obtained by fraudulent misrepresentations as to the amount of labor involved in the divorce case has been eliminated from the case, no allegations upon that subject being contained in the amended pleadings upon which the matter was tried. No evidence was introduced as to what would constitute a reasonable fee in the divorce case. It appears the debtor made the contract without questioning the reasonableness of the fee and only raised the question when the divorce was obtained without contest because of his default upon the cross-complaint of his wife. If the money paid to the appellee on behalf of the debtor was the debtor's own money to do with as he saw fit, as we believe and hold, the question of whether or not the continuance of the order making the so-called allowance to the debtor resulted from concealment of facts

is immaterial, and there is no basis for requiring the repayment to the bankrupt estate of the moneys repaid to the debtor in the form of an allowance. It was his money both before and after the order. It is true that until an accounting was requested by the referee the appellee did not disclose to the court that he was being paid large amounts from such allowance for attorney's fees. No concealment was practiced except such as was involved in the failure of the attorney to advise the court that he was receiving this money. The statements of appellee that the money to be paid to the debtor were necessary for his expenses were in most instances made in discussion of the proposed plan of arrangement and not with reference to the disposition of the money theretofore repaid to the debtor. Certain items of past expense were stated to the court with reference to servants, housekeeping expenses, etc., paid by the debtor, but in no instance did these amounts cover or purport to cover the entire allowance of $1,000 per week and in no instance did the court require a statement or the introduction of evidence on the subject of the disposition of the entire allowance until about August 1941 when appellee filed a detailed statement showing, among other things, the payment of the $5,950 to him for attorney fees. While it is a matter of acute interest to the appellee, we deem it unnecessary to discuss the question of professional ethics as to how far an attorney, under such circumstances, is bound by his obligation to maintain the secrets of his client and how far he is bound by his obligation not to deceive the court. In any event there is no basis

for the order requiring the appellee to refund moneys paid to him by the debtor from his own funds under a valid contract of employment.

As to the jurisdiction of the court to compel the appellee to repay money paid to him by the bankrupt, it is clear that if the money so paid to appellee belonged to the debtor, as we hold, the court had no jurisdiction to order it paid to the trustee in bankruptcy. The real contest is between the debtor and the appellee. The question as to whether the order of allowance in the arrangement proceedings did or could limit the debtor's use of the funds allowed him if doubtful before the adjudication of bankruptcy is set at rest by a retroactive adjudication in bankruptcy which freed his earnings so far as the jurisdiction of the bankruptcy court is concerned from the claims of the bankruptcy court over his property.[6]

Order affirmed.

[Endorsed]: Opinion. Filed Mar. 20, 1944. Paul P. O'Brien, Clerk.

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[6]11 USCA § 778. Procedure upon order directing that bankruptcy be proceeded with. Upon the entry of an order directing that bankruptcy be proceeded with— * * *

(2) in the case of petition filed under section 722 of this title, the proceeding shall be conducted, so far as possible, in the same manner and with like effect as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication in bankruptcy had been filed and a decree of adjudication had been entered on the day when the petition under this chapter was filed; and the trustee nominated by creditors under this

United States Circuit Court of Appeals
For the Ninth Circuit

No. 10460

SAMUEL A. MILLER, Trustee in Bankruptcy, etc.,

Appellant,

vs.

ROLAND RICH WOOLLEY,

Appellee.

DECREE

Appeal from the District Court of the United States for the Southern District of California Central Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted:

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the order of the said District Court in this cause be, and hereby is, affirmed with costs in favor of the appellee and against the appellant.

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chapter shall be appointed by the court, or, if not so nominated or if the trustee so nominated fails to qualify within five days after notice to him of the entry of such order, a trustee shall be appointed as provided in section 72 of this title.

In re Leibowitt, 93 F.2d. 333, 335. Wages of a bankrupt after adjudication are not subject to claims of the estate.

It is further Ordered, Adjudged, and Decreed by this Court, that the appellee recover against the appellant for his costs herein expended, and have executed therefor.

[Endorsed]: Filed and entered March 20, 1944, Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Thursday, April 27, 1944.

Before: Wilbur, Mathews and Stephens, Circuit Judges.

[Title of District Court and Cause.]

ORDER DENYING PETITION FOR REHEARING

Upon consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant, filed April 21, 1944, and within time allowed therefor by rule of court, and valid extension thereof, for a rehearing of above cause be, and hereby is denied.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eight hundred fourteen (814) pages, numbered from and including 1 to and including 814, excluding one original exhibit, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 26th day of May, 1944.

[Seal] PAUL P. O'BRIEN,
Clerk.